

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7042

United States Court of Appeals
FOR THE SECOND CIRCUIT

ELLIOTT H. VELGER,

Plaintiff-Appellant,

against

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

SAMUEL RESNICOFF
Attorney for Plaintiff-Appellant
Office & P. O. Address
280 Broadway
New York, N. Y. 10007
DIgby 9-3896

W. BERNARD RICHLAND,
Corporation Counsel
Attorney for Defendants-Appellees
Municipal Building,
New York, N. Y. 10007
566-2182

3

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75-1042
 DISTRICT COURT

Jury demand date:

1-7-75
 CIV. 2810

TITLE OF CASE

ATTORNEYS

ELLIOTT H. VEIGER

For plaintiff:

SAMUEL RESNICOFF

280 Broadway,

N.Y.C. N.Y. 10007

DI9- 3896-7

AGAINST,

DONALD F. CAWLEY, POLICE COMMISSIONER, CITY OF

NEW YORK, PATRICK V. MURPHY, FORMER POLICE COMMISSIONER,

CITY OF NEW YORK, THE CITY OF NEW YORK, HARRY I.

STEIN, PERSONNEL DIRECTOR AND CHAIRMAN NEW YORK CITY

FIRE SERVICE COMMISSION, AND ABRAHAM D. HEAME, AS

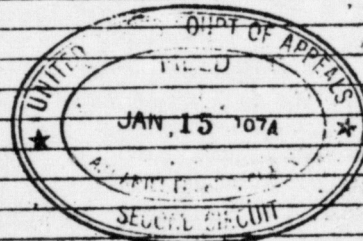
COMPTROLLER, CITY OF NEW YORK.

For defendant:

Corporation Counsel - City of New York

Municipal Building, NYC 10007

Irwin Herzog of counsel.



STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	Disb.
IS 5 mailed X	Clerk	5/24/73	Resnicoff	15	
		6/29/73	Heck	15	
		7/1/73	Resnicoff	15	
		11/2/73	Resnicoff	15	
IS 6 mailed J	Marshal				
Basis of Action:	Docket fee				
CIVIL RIGHTS.	Witness fees				
Action arose at:	Depositions				

ER, VS. DONALD F. CAWLEY, ETC.

JUDGE GU

73 CIV. 235

PROCEEDINGS

DATE	PROCEEDINGS	JUDGE
May 25-73	Filed Complaint. Issued Summons.	
May 25-73	Filed Deft's Notice of Motion to Dismiss complaint returnable 6/30/73, 9:30 A.M.	
May 25-73	Filed Defts Memorandum of Law in support of Motion to dismiss Complaint.	
May 25-73	Filed affdvt. and notice of motion by plttf. for an order convening a Three-Judge District Court. - ret. 7-30-73	
May 25-73	Filed plttf's memorandum in support of complaint and in opposition to defts motion to dismiss.	
May 25-73	Filed summons and Marshals return, served: Patrick V. Murphy, by M. Lesh on 7-2-73 Donald F. Cawley, by J. Adams on 5-3-73 Patrick V. Murphy unable to serve on 6-5-73 Garry I. Bronstein by S. Abelow on 5-31-73 Abraham D. Peare by P. Kalicky on 5-31-73	
May 25-73	Filed defts memorandum of law in opposition to the convening of a Three Judge Court.	
Oct. 15-73	Filed defts. revised memorandum of law in support of the motion to dismiss the complaint and in oppos. to plttf's motion for a statutory 3 judge court.	
Nov-1-73	Filed Opinion #39973 that the motion to convene a three-judge court is denied. The motion of the defendants to dismiss the complaint is denied. - Gurfein, J. m/n	
Nov-1-73	Filed defendants memorandum in support of defts. motion to dismiss.	
Nov-1-73	Filed supplemental brief on behalf of the plaintiff	
Nov-1-73	Filed affdvt. of Elliott H. Velger (plttf.)	
Feb-28-74	Filed memo endorsed on deft's affdvt. of Irwin L. Herzog: In view of plttf's affdvt. in opposition to deft's motion for summary judgment, I will deny summary judgment and suggest that plaintiff serve an amended complaint incorporating the substance of his affdvt. If this is done promptly and issue is joined promptly, discovery may proceed with a view to trial of the action in June. So ordered. - Gurfein, J. m/n	
Feb-28-74	Filed plaintiff's affdvt. of Irwin L. Herzog (memo end. on this affdvt.)	
Feb-28-74	Filed plttf's affdvt. of Elliott H. Velger re deft's motion for summary judgment.	
Mar-13-74	Filed stip. and order that plaintiffs time to serve an amended complaint is ext. to March 22, 1974 - Gurfein, J.	
Mar-15-74	Filed AMENDED COMPLAINT.	
Mar-20-74	Filed deft's interrog.	
Mar-20-74	Filed ANSWER of defendants	A.P.
Apr-16-74	PRE-TRIAL CONFERENCE HELD BY Gurfein, J.	
May-9-74	Filed plaintiffs answers to interrog.	
May-9-74	Filed plaintiffs interrogatories	
Jun-14-74	Filed stip. and order that defts' time to answer plttf's interrog. is ext. to 9-20-74 -- Gurfein, J.	
Sep. 10-74	Filed ANSWERS to Interrogatories of Defts.	
Nov-15-74	PRE-TRIAL CONFERENCE HELD BY Werker, J.	
Nov-15-74	NON-JURY TRIAL BEGUN BEFORE WERKER, J. and concluded Decision reserved. -- Werker, J.	
Dec-11-74	Filed OPINION #41558....After a trial on the merits, this Court finds against plaintiff on all issues. Judgment is hereby granted for defendants without costs. So ordered. - Werker, J.	
Dec-11-74	Filed JUDGMENT and order that defendants have judgment against the plttf dismissing the complaint without costs. -- Clerk.	

Ger v. Donald F. Crawley

page 3

Judge Werker

Continuation

PROCEEDINGS

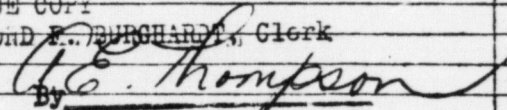
Date Order or
Judgment Noted

07-75 Filed notice of appeal by plaintiff to the USCA for the 2nd
Circuit from from judgment dismissing the complaint, copy to
Corporation Counsel.

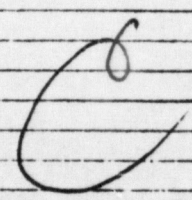
A TRUE COPY

RAYMOND E. BURGHARDT, Clerk

By



Deputy Clerk





UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLIOTT H. VELGER,

Plaintiff,

-against-

DONALD F. CAWLEY, Police Commissioner,
City of New York, PATRICK V. MURPHY,
former Police Commissioner, City of
New York, THE CITY OF NEW YORK, HARRY
I. BRONSTEIN, Personnel Director and
Chairman, New York City Civil Service
Commission, and ABRAHAM D. BEAME, as
Comptroller, City of New York,

Defendants.

Civil Action
No.

73 Civ
2350

COMPLAINT FOR A WRIT OF MANDAMUS;
PRELIMINARY INJUNCTION; PERMANENT
INJUNCTION, AND FOR DECLARATORY
JUDGMENT FIXING AND DETERMINING
THE RIGHTS OF PLAINTIFF.

I.
PRELIMINARY STATEMENT

Plaintiff, a citizen of the United States and of the State of New York, successfully competed in an open competitive written examination for Patrolman, Police Trainee Police Department, City of New York. He was duly appointed from an eligible list duly established by the New York City Civil Service Commission as a result of said examination on January 31, 1970. On February 16, 1973, he was dismissed from his position of Patrolman without charges and without a hearing.

II.

JURISDICTION

Jurisdiction is conferred upon the Court as follows:

- (a) Section 1331, Title 28, U.S.C., in that the damages to plaintiff exceeds \$10,000.00 and the matter arises under the United States Constitution, laws and treaties;
- (b) The Fourteenth Amendment to the Constitution of the United States;
- (c) 28 U.S.C. 1343(3) (4) in that plaintiff seeks relief under 42 U.S.C. Section 1981 and Section 1983 and alleges deprivation under color of state laws, of rights, privileges or immunities secured by the Constitution of the United States, or by Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States;
- (d) Plaintiff's action for declaratory and injunctive relief and for damages is authorized by:
 - 1. 28 U.S.C. Sections 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure which relate to declaratory judgments, and
 - 2. 42 U.S.C. Section 1983 which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

III

BASIS FOR ACTION

Plaintiff is a citizen of the United States and of the State of New York. The defendant New York City Civil Service Commission duly announced an open competitive written examination for the position of Patrolman, Police Trainee, Police

Department, City of New York. Plaintiff filed a written application to compete in said examination. The Civil Service Commission after having conducted an investigation, determined that plaintiff met all of the eligibility requirements for the position and permitted plaintiff to compete in said examination. Plaintiff successfully competed in said written examination. Thereafter, he passed the required medical and physical tests and the Civil Service Commission certified plaintiff as eligible for appointment as Patrolman, Police Trainee. The Police Department, City of New York, conducted its own investigation and after a pre-appointment physical examination and an investigation of plaintiff's police record, scholastic background and employment appointed plaintiff from the eligible list on January 31, 1970.

Prior to his appointment as a Patrolman, it was incumbent upon plaintiff to purchase the necessary equipment, gear and uniform which approximated \$500.00. On January 31, 1970, plaintiff enrolled in the John Jay College of Criminal Justice and Long Island University, which were federally funded programs. At the time of his dismissal as hereinafter alleged, plaintiff had earned 22 credits at the John Jay College of Criminal Justice and 21 credits at Long Island University.

On February 16, 1973, plaintiff received a written notice which advised him that the Police Commissioner had decided not to retain him as an employee of the Police Department "your capacity having been unsatisfactory to the Police Commissioner". Annexed herewith and marked Schedule "A" is a copy thereof. At the time of his dismissal, plaintiff was earning \$11,200.00 per

annum. Because of said dismissal, plaintiff was compelled to discontinue his courses at the John Jay College of Criminal Justice and Long Island University which would have culminated in a Police Science Degree. Both Universities are now claiming reimbursement.

At the time of his dismissal, plaintiff was not served with written charges and specifications and was not given a hearing. His summary dismissal besides being arbitrary, capricious and unreasonable, was in violation of plaintiff's constitutional right to procedural due process and the equal protection of the laws. Petitioner could not be dismissed at will.

IV
FIRST CAUSE OF ACTION

The refusal and failure on the part of the local Police Department officials to specifically state the reasons for plaintiff's dismissal and afford him an opportunity to rebut and contradict any accusations made against him was and is contrary to BOARD OF REGENTS v. ROTH, 408 U.S. 546; PERRY v. SINDERMAN, 408 U.S. 593, and GOLDBERG v. KELLY, 397 U.S. 254.

V
SECOND CAUSE OF ACTION

The Civil Rights Act prohibits discrimination in employment because of race, creed, color, religion or national origin. Because of the refusal and failure on the part of the local Police Department officials to specifically advise plaintiff of the reasons for his dismissal, plaintiff is unable to determine

whether his civil rights were violated, and therefore alleges that his summary dismissal under the circumstances was illegal and improper.

VI
THIRD CAUSE OF ACTION

By refusing and failing to specifically advise plaintiff of the reasons for his dismissal and to afford him an opportunity to controvert the basis for the alleged dismissal, plaintiff has been denied procedural due process and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VII
FOURTH CAUSE OF ACTION

The refusal and failure on the part of defendants to give a specific reason for the dismissal of plaintiff was and is in violation of his First and Fifteenth Amendment rights to the Constitution of the United States and denies to plaintiff his right to earn a livelihood. Plaintiff had a property right to his position which could not be summarily taken away. As a result of said dismissal, plaintiff's name has been placed on a list which disqualifies him from competing in Civil Service Examinations for employment in the City and State of New York for at least one year.

VIII
FIFTH CAUSE OF ACTION

The local Police officials have intentionally and purposefully discriminated against plaintiff. Their action is invidious and intentional and was and is intended to deny to plaintiff his constitutional right to hold public office.

IX
PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this Honorable Court:

1. Issue a writ of mandamus directing defendants to reinstate plaintiff to his quondam position of Patrolman, Police Department, City of New York, retroactive to February 16, 1973;

2. Enter a declaratory judgment against all defendants declaring that the action of defendants in terminating plaintiff's employment without charges and without a hearing to be in violation of the Constitution of the United States, in that it denies to plaintiff procedural due process and the equal protection of the laws;

3. Grant a temporary restraining order restraining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from continuing to cause irreparable harm to plaintiff by refusing to employ him in his position and to employ him in civil service positions in the competitive class to which he may be entitled and that would otherwise be available except for the illegal action on the part of defendants;

4. Enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to employ plaintiff in his position of Patrolman, Police Department, City of New York;

5. Enter a final judgment in favor of plaintiff vacating, annulling and setting aside his dismissal from his competitive civil service position of Patrolman which was accomplished without charges and without a hearing on February 16, 1973;

6. Grant plaintiff damages in the sum of \$50,000.00 because of the injury to plaintiff's reputation and good name resulting in the severe limitation of future employment opportunities;

7. That this Court retain jurisdiction of this action until such time as defendants comply with the provisions of the Fourteenth Amendment and the statutes enumerated above, and

8. Grant plaintiff such additional alternative relief as may seem to this Court to be just, proper and equitable.

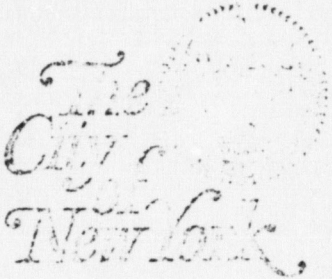
Respectfully submitted

Samuel Resnicoff

SAMUEL RESNICOFF, Esq.,
Attorney for Plaintiff
Office & P. O. Address
280 Broadway
New York, New York, 10007
(DI 9-3896)

10a

Schedule A, Letter From Police Department,
February 8, 1973, Annexed to Foregoing
Complaint.



POLICE DEPARTMENT

NEW YORK, N. Y. 10013

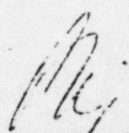
February 8, 1973

Probationary Patrolman
Elliot H. Volger
Shield No. 18079
P.A.R.T.S.

You are hereby notified that the Police Commissioner of the City of New York has decided not to retain you as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner.

Accordingly, he directs that you be given this notification in writing, to that effect, in accordance with the provisions of law and the rules of the City Civil Service Commission.

Effective 2400 hours, February 16, 1973, your services in the Police Department of the City of New York will be terminated.


Peter S. Ring
ASSISTANT DIRECTOR
POLICE PERSONNEL

SUMMONS IN A CIVIL ACTION

CIV. 16 (2-66)
(Formerly D.C. Form No. 45a Rev. (8-60))**United States District Court**

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. _____

ELLIOTT H. VELGER,

Plaintiff

SUMMONS

DONALD P. CAWLEY, Police Commissioner,
City of New York, PATRICK V. MURPHY,
former Police Commissioner, City of
New York, THE CITY OF NEW YORK, HARRY
I. BRONSTEIN, Personnel Director and
Chairman, New York City Civil Service
Commission, and ABRAHAM D. BEAME, as
Comptroller, City of New York

Defendant

To the above named Defendants :

You are hereby summoned and required to serve upon
SAMUEL RESNICOFF, Esq.,

plaintiff's attorney , whose address

280 Broadway
New York, New York, 10007

an answer to the complaint which is herewith served upon you, within **20** days after service of this
summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be
taken against you for the relief demanded in the complaint.

Thomas E. Anderson
Clerk of Court.*E. H. Beck*
Deputy Clerk.Date: **May 20 1973**

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLIOTT H. VELGER,

73 Civ. 2350
MLG

Plaintiff,

-against-

NOTICE OF
MOTION TO
DISMISS THE
COMPLAINT

DONALD F. CAWLEY, Police Commissioner,
City of New York, PATRICK V. MURPHY,
former Police Commissioner, City of
New York, THE CITY OF NEW YORK, HARRY
I. BRONSTEIN, Personnel Director and
Chairman, New York City Civil Service
Commission, and ABRAHAM D. BEAME, as
Comptroller, City of New York,

Defendant,


PLEASE TAKE NOTICE that upon the complaint herein, the defendants will move this Court, at a regular session thereof to be held at the United States Courthouse, Foley Square, New York, New York, on the 30th day of July, 1973 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing this action pursuant to Federal Rules of Civil Procedures 12(b)(1) and 12(b)(6) on the grounds that this court lacks jurisdiction over the subject matter in the controversy

herein and that the complaint fails to state a claim upon which relief can be granted.

Dated: New York, New York
June 11, 1973.

NORMAN REDLICH
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007
566-2182

TO: Samuel Resnicoff, Esq.
280 Broadway
New York, N.Y. 10007

BY: 
Assistant Corporation Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLIOTT H. VELGER,

Plaintiff,

- against -

DONALD F. CAWLEY, Police Commissioner,
City of New York, PATRICK V. MURPHY,
former Police Commissioner, City of New
York, THE CITY OF NEW YORK, HARRY I.
BRONSTEIN, Personnel Director and Chairman,
New York City Civil Service Commission,
and ABRAHAM D. BEAME, as Comptroller, City
of New York,

73 CIV. 2350

Defendants.

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of ELLIOTT H. VELGER, duly sworn to the 16th day of July, 1973, the summons and complaint filed herein, and upon all of the prior papers and proceedings had herein, the undersigned will move this Court before United States District Judge MURRAY I. GURFEIN at the United States Courthouse, Foley Square, New York, New York, on the 30th day of July, 1973, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order convening a Three-Judge District Court, pursuant to Title 28, U.S.C. Sections 2281 and 2284, to declare Section 63 of the New York State Civil Service Law unconstitutional, and for such other, further

and different relief as to the Court may seem just and proper in the premises.

DATED: New York, July 16, 1973.

Yours, etc.,

SAMUEL RESNICOFF, Esq.
Attorney for Plaintiff
Office & P. O. Address
280 Broadway
New York, N.Y. 10007
(DIgby 9-3896)

TO:-

NORMAN REDLICH, Esq.
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, N.Y. 10007

TO:

HON. LOUIS J. LEFKOWITZ
Attorney General, State of New York
80 Centre Street
New York, N. Y.

HON. NELSON D. ROCKEFELLER
Governor, State of New York
State Capitol
Albany, New York.

Affidavit of Elliot H. Velger,
In Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLIOTT H. VELGER,

Plaintiff,

- against -

DONALD F. CAWLEY, Police Commissioner,
City of New York, et al., etc.,

Defendants.

STATE OF NEW YORK }
CITY OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ELLIOTT H. VELGER, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action and submit this affidavit in support of the instant application for an order to convene a Three-Judge District Court to declare SECTION 63 of the NEW YORK STATE CIVIL SERVICE LAW unconstitutional.

2. The action herein was instituted on May 25, 1973. On June 15, 1973, the Corporation Counsel, City of New York, representing the defendants, served a Notice of Motion to dismiss the complaint.

3. On November 9, 1971, a three-Judge District Court consisting of Chief Judge J. EDWARD LUMBARD, United States District Judges EDWARD C. McLEAN and CHARLES H. TENNEY, declared Section 53 of the New York State Civil Service Law unconstitutional in McL. DOUGALL, et al. v. SUGARMAN, et al. The decision by Judge TENNEY is reported in 339 F. Supp. 906.

4. In SNEAD v. DEPARTMENT OF SOCIAL SERVICES, a challenge was directed to the constitutionality of Section 72 of the New York State Civil Service Law. United States District Judge EDWARD WEINFELD in a luminous opinion reported in 351 F. Supp. 1360, convened a Three-Judge District Court. Thereafter, and on March 12, 1973, Judge WEINFELD writing for the Court (MULLIGAN, C.J., WEINFELD and BRYAN, U.S. District Judges) declared Section 72, supra, unconstitutional. The opinion is reported in 355 F. Supp. 764.

5. I successfully competed in an open competitive written examination for Patrolman, Police Trainee, Police Department, City of New York. On January 31, 1970, I was appointed to that position from an eligible list which was duly established by the defendant NEW YORK CITY CIVIL SERVICE COMMISSION. On February 16, 1973, I was dismissed from my position without charges and without a hearing. It is my contention that I had a "property right" to my position as enunciated by the Supreme Court of the United States in PERRY v. SINDERMAN, 408 U.S. 593, and BOARD OF REGENTS v. ROTH, 408 U.S. 564. The action of defendants in summarily terminating my employment without charges, without a reason, and without a hearing, deprived me of a constitutionally protected right to liberty and property which may not (consistent with the due process clause of the FOURTEENTH AMENDMENT and the FIRST AMENDMENT) be infringed upon without a due process hearing.

6. SECTION 63 of the NEW YORK STATE CIVIL SERVICE LAW provides as follows:

"§ 63. PROBATIONARY TERM

1. Every original appointment to a position in the competitive class and every interdepartmental promotion from a position in one department or agency to a position in another department or agency shall be for a probationary term; provided, however, that upon interdepartmental promotion the appointing officer may waive the requirement of satisfactory completion of the probationary term. The state civil service commission and municipal civil service commissions may provide, by rule, for probationary service upon intradepartmental promotion to positions in the competitive class and upon appointment to positions in the exempt, non-competitive or labor classes.

"When probationary service is required upon promotion, the position formerly held by the person promoted shall be held open for him and shall not be filled, except on a temporary basis, pending completion of his probationary term.

2. The state civil service commission and municipal civil service commissions shall, subject to the provisions of this section, provide by rule for the conditions and extent of probationary service."

A perusal of said section will readily indicate it is constitutionally offensive, invidious and discriminatory, since it makes no provision for a hearing or stated charges prior to dismissal. Without a reason and without charges, I am not in a position to defend myself. I am unable to determine whether my dismissal was accomplished in violation of my civil rights and whether I was discriminated against because of my creed, race, color or ethnic background.

WHEREFORE, it is respectfully requested that an order be issued convening a Three-Judge District Court to declare SECTION 63 of the New York State Civil Service Law unconstitutional.

/s/ ELLIOTT H. VELGER

Sworn to before me this
16th day of July 1973.

BRETA LA PATIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-7429450 Qual. in Kings Co.
Certificate filed in New York County
Commission Expires 12/31/74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----
ELLIOTT H. VELGER,

Plaintiff,

- against -

DONALD F. CAWLEY, Police Commissioner,
City of New York, PATRICK V. MURPHY,
former Police Commissioner, City of New
York, THE CITY OF NEW YORK, HARRY I.
BRONSTEIN, Personnel Director and Chairman,
New York City Civil Service Commission,
and ABRAHAM D. BEAME, as Comptroller, City
of New York,

Defendants.

STATE OF NEW YORK }
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

ELLIOTT H. VELGER, being duly sworn, deposes and says:

1. I was born on August 8, 1951, in the Borough of Manhattan, City and State of New York.
2. On or about July 20, 1968, I competed in an open competitive written examination for the position of Patrolman (Police Trainee) Police Department #8046. Annexed herewith and marked Schedule "B" is a copy thereof. On January 13, 1970, I received a notification from the Police Department that I had been certified for appointment and I was directed to report on January 20, 1970. Annexed herewith and marked Schedule "C" is a copy thereof. On January 31, 1970, I was appointed a Police Trainee.

3. On August 8, 1972, I became ~~twenty-one~~ years of age. On August 15, 1972, I was appointed a probationary Patrolman.

4. On August 14, 1972, as a Police Trainee, my salary was \$6400.00 per annum. On August 15, 1972, the day I was appointed a probationary Patrolman, my salary was increased to \$10,699.00 per annum. Annexed herewith and marked Schedule "D" is a copy of the Police Department Personnel Order #209, appointing me to the position of probationary Patrolman.

/s/ ELLIOTT H. VELGER

Sworn to before me this
20th day of September 1973.

GRETA LA PATIN
NOTAR PUBLIC, STATE OF NEW YORK
No. 24 742945C Qual. in Kings Co
Certificate filed in New York County
Commission Expires March 30, 1974

Patrolmen (P.D.) #8046

Patrolman, Police Trainee (P.D.)

No. 8046
PATROLMEN, POLICE TRAINEE
(POLICE DEPARTMENT)

This examination is open only to men. A single list will be established from this examination and appointments will be made to either Patrolman or Police Trainee (Police Department) depending on age.

Police Trainee is a trainee class of positions. A Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without taking any further written or physical tests, provided he has a satisfactory record as trainee and provided he passes a medical test identical to the one given to Patrolman candidates.

Salary, Vacancies and Benefits (Patrolman): The entrance salary is \$7,932 per annum at present. Patrolmen receive increments of \$221 at the end of their first year, \$551 at the end of their second year and \$679 at the end of their third year in the Police Department. The salary reached through these increments is \$9,383 per annum. In addition, there is an annual uniform allowance of \$185, a holiday pay allowance of eleven days per year, a \$180 contribution per man per year by the City to a welfare fund, and a \$1 per day contribution per man by the City to an annuity fund. Vacancies occur from time to time.

Police Trainee (Police Department): The entrance salary is \$4,000 per annum. There will be an increment of \$240 per annum after each year of trainee service up to a maximum of four increments. There will be a considerable number of positions in the Police Department under this program.

Many benefits are, or may be, enjoyed by New York City employees. These benefits include generous annual leave, sick leave, membership in a liberal pension system, the Social Security System, a health insurance plan wholly paid for by the City of New York and the blood credit program.

Applications: Filing Period—Pre-application forms issued and received Monday through Friday from 9 a. m. to 5 p. m., except Thursday from 8:30 a. m. to 5:30 p. m. and Saturday from 9 a. m. to 12 noon, from June 5, 1968 through June 25, 1968.

Pre-application forms are obtainable free either by the applicant in person or by his representative at the Application Section of the Department of Personnel at 49 Thomas Street, New York, N. Y. 10013. They will also be mailed on request provided that the request to the above section and address is accompanied by a stamped (6 cents) self-addressed 9½-inch envelope for each application requested. All such mail requests must be postmarked not later than June 18, 1968. A pre-application form submitted by mail must be postmarked no later than the last date for receipt of pre-application forms.

Pre-application forms are also issued in person (but not received) at all branches of the public library system in the various boroughs in New York City, Mount Vernon, New Rochelle, White Plains and Yonkers.

Regular applications will be issued and accepted for filing in person only at the time and place of the written test only from those who filed pre-application forms during the filing period.

Date and Place of Test: The written test is expected to be held July 20, 1968. This date is tentative only and may be changed if circumstances so demand.

Promotion Opportunities: The Administrative Code provides that Sergeants shall be selected from among Patrolmen of the First Grade. Sergeants are eligible for promotion examination to Lieutenant; Lieutenants are eligible for promotion examination to Captain.

Time in service as a police trainee shall not be considered as service in the uniformed force for pension or retirement purposes, nor in computing seniority in a promotion examination, nor in granting advancement in grade as a Patrolman.

Age Requirements (Patrolman): The Administrative Code provides that only persons shall be appointed Patrolman who shall be on the date of the written test less than 29 years of age; and the Public Officers Law provides that persons shall be at least 21 years of age at the time of appointment.

Exception: All persons who were engaged in military duty, as defined in Section 243 of the Military Law, subsequent to July 1, 1940, may deduct the length of time, not exceeding a total of six years, which they spent in such military duty from their actual age in determining their eligibility (Sub. 10a, Section 243, Military Law).

Police Trainee: Candidates must be at least 16 years of age on the date of the written test and at least 17 years of age at time of appointment.

At the time of investigation, applicants will be required to submit proof of date of birth by transcript of record of the Bureau of Vital Statistics or other satisfactory evidence. Any willful misstatement may be cause for disqualification.

Minimum Requirements: At the time of appointment: (a) graduation from a four-year senior high school; or (b) possession of a high school equivalency diploma; or (c) certification of having passed the New York State high school equivalency examination; or (d) an acceptable G.E.D. certificate issued by the Armed Forces.

At the time of appointment applicants must be United States citizens.

Applicants must not be less than 5 feet 7 inches (bare feet) in height and must approximate normal weight for height. Required vision, 20/30 in each eye separately, without glasses.

At the time of appointment as a Patrolman, residence in New York City, or in Nassau, Westchester, Suffolk, Orange, Rockland, or Putnam Counties is required. Also, at the time of appointment as a Patrolman, possession of a valid motor vehicle operator's license is required.

Proof of good character will be an absolute prerequisite to appointment. The following are among the factors which would ordinarily be cause for disqualification: (a) conviction of a misdemeanor or an offense, the nature of which indicates lack of good moral character or disposition toward violence or disorder; (b) repeated conviction of an offense, where such convictions indicate a disrespect for the law; (c) repeated discharge from employment where such discharges indicate poor performance or inability to adjust to discipline; (d) addiction to narcotics or excessive use of alcoholic beverages; (e) discharge from the Armed Forces other than the standard honorable discharge. In accordance with the provisions of the Administrative Code, persons convicted of a felony are not eligible for positions in the uniformed forces of the Police Department. In addition, the rules of the City Civil Service Commission provide that no person convicted of petty larceny, or who has been dishonorably discharged by the Armed Forces shall be examined, certified or appointed as a patrolman.

The Police Commissioner has the right to appoint one out of three on each certification.

The rules of the City Civil Service Commission provide that no name shall be certified more than three times to the same appointing officer for the same or similar position, unless at such officer's request.

Those appointed as probationary Patrolman must serve a probationary period as provided in the Rules of the City Civil Service Commission existing at the time of appointment.

A police trainee will not be considered a member of the uniformed force or a peace officer.

Duties of Patrolman: To perform general police duties in the various branches of the department; to perform all additional functions for the rank prescribed by relevant laws, Rules and Procedures, orders or directives of the Police Department; and to perform special duties or assignments as directed by the Police Commissioner in his discretion.

Duties of Police Trainee: Following orientation and training at the Police Academy, performs, under direct supervision, routine non-law enforcement tasks in Police Headquarters or field units, performs related work.

Examples of Typical Tasks (Police Trainee): Assists precinct personnel in the preparation of records, documents, correspondence, reports, filing, typing, etc.; assists precinct detectives in a clerical capacity; assists members of specialized units in their clerical tasks; operates switchboards.

Tests: Written, weight 100, 75% required.

The written test will be of the multiple-choice type and will be designed to test the candidates' intelligence, initiative, judgment and capacity to learn the work of a police trainee and a patrolman. It may include questions on police situations, reading comprehension, arithmetic reasoning and vocabulary.

Candidates who pass the written test will be required to pass a qualifying medical test and a qualifying physical test. No second opportunity will be given to candidates who fail the qualifying physical test; or who fail to appear for the qualifying physical test, except those on active military duty.

The physical test will be designed to test the strength, agility, and power of candidates. Candidates will take the physical tests at their own risk of injury, although every effort will be made to safeguard them. Medical examination will be required prior to the physical test and the Department of Personnel reserves the right to exclude from the physical test any candidate who is found medically unfit. Candidates will be required to achieve a minimum mark of 70% or higher on the physical test in order to qualify. Medical and physical requirements as posted on the Department of Personnel's Bulletin Board must be met.

Candidates shall be rejected for any deficiency, abnormality or disease that tends to impair health or fitness. Such causes for rejection include but are not limited to defective vision, heart and lung diseases, hernia, paralysis and defective hearing. A history of any psychoneurotic disorder may disqualify. Persons must be free from such physical or personal abnormalities or deformities as to speech and appearance as would handicap them in the performance of their duties as a Patrolman.

Candidates who fail to attain the pass mark for any test, subject or part of the examination shall be deemed to have failed the examination and no further test, subject, or part of the examination shall be rated.

Candidates are warned to make full and complete statements on their application blanks and medical questionnaires. Misrepresentation is ground for disqualification.

The pertinent sections of the General Examination Regulations are also to be considered part of this notice.

DEPARTMENT OF PERSONNEL, SONOMO HOFFMAN, Personnel Director; GEORGE HENRY JR., Secretary. 15.11

THE CITY OF NEW YORK
POLICE DEPARTMENT
240 CENTRE STREET
NEW YORK, N. Y. 10013

Page No. 21
Exam No. 8046
List No. 1143
Appl. No. 04953

Elliott H. Velger
3535 Rochambeau Avenue
Bronx, N.Y. 10467

THIS IS NOT A NOTICE
OF APPOINTMENT

Date January 13, 1970

Dear Sir:

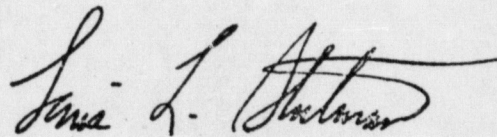
Your name has been certified by the City Civil Service Commission for consideration of appointment to the position of Police Trainee. The salary is \$4,000 per annum. The tenure of appointment is probably permanent. (Certified applicants are subject to conditions set forth by the City Civil Service Commission.)

Report promptly on 1/20/70 at 8:30 a.m., at the Medical Unit, 7th Floor of the Police Academy, 235 East 20th Street, Manhattan. Bring this letter, a pen, your High School Diploma and a photostatic copy of your Birth Certificate with you.

If you are appointed your employment will be conditional, contingent on the successful conclusion of your character investigation, medical examination and satisfactory work performance.

If you do not wish to be considered, sign the statement below, checking the reason for your declination, filling in the information required, and return to the Chief Clerk's Office, 240 Centre Street, New York 10013, immediately. No other form of declination is acceptable. If you do decline, please note that we may not make any further appointments from this list.

A declination of appointment or a failure to respond to this notice will result in your name being withheld from future certification. Thereafter your name can be restored only upon written request for such recertification to the Department of Personnel. Upon restoration of your name to the list, you will be placed at the end of the list for recertification.



LOUIS L. STUTMAN
CHIEF CLERK

DECLINATION OF APPOINTMENT

I hereby decline appointment for the reason checked:

- ☐ My inability to accept at this time. (State reason on back of this letter.)
- ☐ No High School Diploma.

Declination will continue in force for at least 60 days. They may be withdrawn on written application to Department of Personnel, 220 Church Street, New York, N. Y. 10013, with reason therefor.

Sign here _____

Address _____

Misc. 306

8046

THE CITY OF NEW YORK
DEPARTMENT OF PERSONNEL
220 CHURCH STREET, NEW YORK, N. Y. 10013

NOTICE OF ELIGIBILITY

YOU HAVE PASSED THE EXAMINATION TAKEN BY YOU FOR THE POSITION INDICATED.
YOUR RATINGS, AND RANK ON THE ELIGIBLE LIST, ARE AS SHOWN.

PATROLMAN, POLICE TRAINEE

TITLE:

8046 NAME NO.	3 PART	88 TEST SCORE	100 WEIGHT							88.000 ADJUSTED FINAL AVERAGE
VETERAN'S PREF STATUS	ELLIOTT H VELGER 3535 ROCHAMBEAU AVE BX N Y 10467								1143 LIST NUMBER	
SUBJECT TO									04953 APPLICATION NUMBER	

SEE OTHER SIDE

POLICE DEPARTMENT
CITY OF NEW YORK

August 18, 1972.

Personnel Order No. 209

1- The following Police Trainees having satisfactorily completed service as such trainees in accordance with Section 434a-8.0 of the Administrative Code, having reached the age of twenty-one years and having passed a medical examination were appointed to the position of Patrolman on Probation in the Police Department of the City of New York, at \$10,699. per annum, and were assigned to the Police Academy, Recruits' Training School:

Effective August 15, 1972.

		<u>Date of Birth</u>	<u>Shield</u>
Salvatore P. Contrastano	865954	8-11-51	18187
Gary R. Duffy	865955	8-2-51	1751
Daniel J. Gilroy	865956	3-28-50	585
Kenneth M. Licata	865957	6-21-51	17366
Robert E. Spottke	865958	8-9-51	18153
Elliott H. Velger	865959	8-8-51	18079

2- The following TRANSFERS and ASSIGNMENTS are ordered:

LIEUTENANT

To take effect 0800, August 21, 1972.

Precinct. Joseph P. Burbridge 832224, from 25th Precinct to 24th

SERGEANT

To take effect 2400, August 20, 1972.

cinct. Robert Seignious 843270, from 107th Precinct to 24th Pre-

PATROLMEN

To take effect 0800, August 17, 1972.

Richard J. Velez 856110, from Detective Bureau, Street Crime Squad to Narcotics Division (O.C.C.B.)

To take effect 0800, August 21, 1972.

Peter Cassi 823851, Detective Bureau, from Office of Chief of Detective's to Special Investigations Division, assignment to Clerical duty continued.

Vincent L. Gallo 856935, from Mid-Town Precinct North to 103rd Precinct.

Detective Bureau, from Commands indicated to Commands specified:

		<u>From Com'd.</u>	<u>To Com'd.</u>
John M. Nichtern	845913	7th D.D.	9th D.D.
John J. Kenney	839004	9th D.D.	7th D.D.

P.O. 209

copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

ELLIOTT H. VELGER,

Plaintiff,

-against-

DONALD F. CARLEY, Police Commissioner,
City of New York, PATRICK V. KELLEY,
former Police Commissioner, City of
New York, THE CITY OF NEW YORK,
HARRY I. BRANSTEN, Personnel Director
and Chairman, New York City Civil
Service Commission, and ABRAHAM D. BEAME,
as Comptroller, City of New York,

Defendants.

----- X

A P P E A R A N C E S :

SAMUEL RESNICOFF
Attorney for Plaintiff
New York, N.Y.

NORMAN REDLICH, Corporation Counsel
Attorney for Defendants
New York, N.Y.

GURFEIN, D.J.:

This is an action against the Police Commissioner
of the City of New York and other city officials by Elliott H.
Velger who alleges that he was a Patrolman Trainee employed

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FILED
U.S. DISTRICT COURT
NOV 13 1973
S.D. OF N.Y.

73Civ. 2350

#39973

by the Police Department and that he was discharged without a hearing and without stated reasons other than his "capacity having been unsatisfactory to the Police Commissioner,"^{1/}

He claims federal question jurisdiction, 28 U.S.C. §1331, violation of constitutional rights under the 14th Amendment, and deprivation of constitutional rights under 42 U.S.C. §1343(3) and (4). He seeks declaratory relief under 28 U.S.C. §§2201 and 2202, and Rule 57, Fed. R. Civ. P., and injunctive relief under 42 U.S.C. §1983.

The defendants have moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) Fed. R. Civ. P. for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

The plaintiff moves under 28 U.S.C. §§2281 and 2284 for an Order to convene a three-judge court to declare Section 63 of the New York State Civil Service Law unconstitutional.

^{1/} Since the complaint was filed it has been discovered that Velger was no longer a trainee but that he had been appointed a "Patrolman on Probation."

The complaint alleges that the plaintiff successfully competed in an open competitive written examination for "Patrolman, Police Trainee," and was duly appointed from an eligible list established by the New York City Civil Service Commission as a result of such examination on January 31, 1970. On that day, the plaintiff purchased \$500 worth of necessary equipment, gear and uniform and enrolled in the John Jay College of Criminal Justice and Long Island University. On February 16, 1973, after three years of employment, the plaintiff received a notice of termination from the Police Department. At the time of his dismissal, he was earning \$11,200 per annum. As a result of his dismissal he was forced to quit the colleges where he was studying for a Police Science Degree, and both Universities are now claiming reimbursement.

He alleges that: 1) the refusal to afford him a hearing is a denial of due process; 2) the refusal to state the reason for his dismissal makes it impossible for the plaintiff to determine whether his civil rights have been violated; 3) that his property right to his position has been summarily taken away, as a result of which dismissal "plaintiff's name has been placed on a list which disqualifies him from competing in Civil Service Examinations for

employment in the City and State of New York for at least one year."

The plaintiff seeks the following relief:

- 1) Mandamus directing the defendants to reinstate plaintiff to his quondam position;
- 2) A declaratory judgment that he has been denied procedural due process;
- 3) A temporary restraining order restraining the defendants from continuing to refuse to employ him;
- 4) A preliminary and permanent injunction to the same effect;
- 5) A final judgment annulling his dismissal;
- 6) Money damages and
- 7) Alternative relief that may be proper.

It may be noted that the complaint does not attack the constitutionality of Section 63 of the New York Civil Service Law. Plaintiff seeks to do this only by the motion which asks for the convening of a three-judge court. That is not sufficient. A three-judge court may be convened only

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when the complaint justifies it. "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint." Ex parte Foresky, 290 U.S. 30, 32 (1933). See Bartlett & Co. Grain v. State Corporation Commission, 223 F. Supp. 975, 980-87 (D. Kansas, 1963); Silver v. Queen's Hospital, 33 F.R.D. 223 (D. Hawaii 1971). In any event, the attack on Section 63 of the New York Civil Service Law as unconstitutional based on "[t]he claim that the appointment of provisional and probationary employees not entitled to the protection of tenure is irrational is too frivolous to warrant discussion." Russell v. Hodges, 470 F.2d 212, 218 Fn. 6 (2 Cir. 1972). Since the Court of Appeals for this Circuit has already held the contention of the plaintiff "frivolous," there is no need to convene a three-judge court to consider it. Ex parte Foresky, supra; Swift & Co. v. Wickham, 382 U.S. 111, 115 (1965).^{2/}

Turning to the motion to dismiss, there is jurisdiction, based in part upon an alleged violation of the

^{2/} Belatedly, even later than his motion to convene a three-judge court to declare Section 63 of the Civil Service Law unconstitutional, he now in his brief seeks to challenge Section 3 of the Public Officers Law on the ground that the requirement that the appointee attain the age of 21 years violates due process. That is not a proper way to raise the issue.

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plaintiff's civil rights, 42 U.S. §§1981 and 1983 and the plaintiff need show no exhaustion of State administrative remedy. See Freiser, Correction Commissioner, et al. v. Rodriguez et al., ____ U.S. ____, slip op. No. 71-1369 (May 7, 1973). But cf. Burger, C.J., dissenting in Perry v. Sindermann, 408 U.S. 593, 603 (1972). He must, however, show standing based upon State law and a violation of due process under the Federal Constitution.

The Supreme Court has recently considered the elements of tenure which make it necessary to afford procedural due process to an employee, such as notice and the right to a hearing. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, supra.

In Roth, the Court held "that the Constitution does not require opportunity for a hearing before the non-renewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in 'liberty' or that he had a 'property interest in continued employment, despite the lack of tenure or a formal contract.'" See Perry v. Sindermann, 408 U.S. at 599.

In the case at bar the plaintiff had no contractual tenure. He was appointed as a police trainee on January 13,

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1970. He was appointed to the position of "Patrolman on Probation in the Police Department of the City of New York" on August 18, 1972. At the termination of six months probationary service, he was discharged without a specification of charges or a hearing.

The Supreme Court has explained that a mere "unilateral expectation" of continued employment was not "property," and would not trigger due process guarantees. Perry v. Sindermann, supra, 408 U.S. at 603; see Russell v. Hodges, supra, at 216. His claim of tenure must be based upon State law. Board of Regents v. Roth, 408 U.S. at 578.

The New York courts have held that the Police Commissioner has power to determine whether or not a probationary patrolman is to receive permanent appointment, that the sole requirement in making the decision is that the Commissioner act in good faith, and that a hearing is not required. Matter of Going v. Kennedy, 5 A.D.2d 173, 178; N.Y.S.2d (1958). Since, as a matter of State law, the probationary patrolman has no legitimate expectation of tenure, he has no such "property" right as the Supreme Court defined in Roth.

The plaintiff seeks to counter the conclusion that he was merely a "patrolman on probation" by pointing

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out that the public notice of examination for "Patrolman, Police Trainee (Police Department)" recites that "[A] police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without taking any further written or physical tests, provided he has a satisfactory record as trainee and provided he passes a medical test identical to the one given to Patrolman Candidates."

Since the plaintiff was appointed shortly after his 21st birthday, he contends that he was actually appointed a Patrolman, rather than a "Patrolman on probation," despite the order of appointment itself.

The notice of examination for Police Trainee also included the following, however: "Those appointed as probationary Patrolman must serve a probationary period as provided in the Rules of the City Civil Service Commission existing at the time of appointment." (Emphasis supplied).

While the language of the Notice of Examination could have been clearer, the status of the trainee upon the attainment of his 21st birthday was mandated as probationary by Section 63 of the Civil Service Law.

Though we talk in terms of the employee's "expectation," the test, I think, must be objective. That is to

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say, his tenure, whether express or implied, must be objectively determined. A unilateral expectation of employment is not enough. Of course, if the statute or rule did prescribe tenure, a failure by the appointing power to abide by its terms would not destroy the legitimate expectation. That is not the case here. I am constrained to hold that there has not been an adequate showing of a "property right." See Manzinos v. Elliott, et al., ____ F.Supp. ____, 72 Civ. 3125 (CHT), Feb. 28, 1973, per Tenney, J.

In the absence of a claim of violation of First Amendment right, the plaintiff must show that the State had made a charge that might damage his standing in the community or had imposed a stigma that "foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573. In the case at bar there was no charge laid against the plaintiff. He was dismissed without the assignment of a reason. No stigma attaches to the mere loss of the opportunity to become a patrolman.

The complaint, which must be taken as true, alleges, however, that "[a]s a result of said dismissal, plaintiff's name has been placed on a list which disqualifies him from competing in Civil Service Examinations for employment in

the City and State of New York for at least one year."
(4th "cause of action").

The court held a conference with counsel after the motions were filed, and requested the parties to furnish relevant information on whether this allegation is true. Neither party has done so. Accordingly, I must accept the allegations of the complaint as true. If this allegation is true, I think a sufficient showing of the violation of his rights has been shown to require procedural due process for the plaintiff on the part of the Police Commissioner.

As the pleading stands, I have no choice but to deny the motion to dismiss. On the other hand, a showing that the allegation is untrue by affidavit may suffice for summary judgment without a trial.

If the Commissioner had administrative discretion to act as he did without a hearing, the State court is presumably available, if the request is timely, for a determination of whether the action taken was "arbitrary and capricious." Matter of Going v. Kennedy, supra, 5 A.D. 2d at 176.

The motion to convene a three-judge court is denied. The motion of the defendants to dismiss the complaint is denied.

Dated: October 31, 1973.

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M. L. GURFEIN

U S D J

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Affidavit of Irwin L. Herzog, In Opposition
To Motion.

37a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ELLIOTT H. VELGER, :

Plaintiff, :

73 Civ. 2350
MIC

-against- :

DONALD P. CAWLEY, Police Commissioner, :
City of New York, PATRICK V. MURPHY, :
former Police Commissioner, City of :
New York, THE CITY OF NEW YORK, :
HARRY I. BRONSTEIN, Personnel Director :
and Chairman, New York City Civil :
Service Commission, and ABRAHAM D. :
BLANE, as Comptroller, City of New :
York, :

Defendants. :
-----x

AFFIDAVIT

IRWIN L. HERZOG, being duly sworn, deposes and
says:

1. I am Assistant Corporation Counsel in charge of
civil service litigation and as such I am fully familiar with
the facts and circumstances hereinafter set forth.

2. This affidavit is submitted in order to
refute plaintiff's allegation that as a result of his dis-
missal from his probationary position, he is automatically
disqualified from competing in Civil Service Examinations
for employment in the City and State of New York for at least
one year (4th "cause of action"). This allegation is denied.

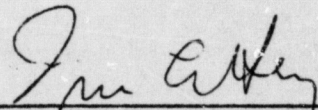
3. There is no statute, rule, regulation or other
authority which precludes dismissed probationary employees
from competing in other Civil Service Examinations.

4. The only reasons for disqualifying applicants from prospective civil service employment are set forth in §50(4) of the Civil Service Law (McKinney 1973). A true copy of this section is annexed hereto and marked Exhibit I. It is clear from the face of this statute that it provides no support for the instant plaintiff's allegation that he will ipso facto be disqualified for future civil service.

5. Plaintiff was dismissed during his probationary period, and is free to compete in future civil service examinations provided he meets the standard requirements for such examinations.

6. The Court is respectfully requested to construe this affidavit as a motion for summary judgment pursuant to its decision on October 31, 1974. Deponent respectfully submits that no questions of fact remain and that summary judgment would be the proper disposition for the instant action.

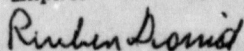
WHEREFORE, defendant requests that summary judgment be entered against plaintiff and in favor of defendants.


IRWIN L. HERZOG

Sworn to before me this

6th day of February, 1974.

REUBEN DAVID, Notary Public
State of New York, No. 31-5927370
Qualified in New York County
Commission Expires March 30, 1974



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(a) who is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies; or

(b) who is found to have a physical or mental disability which renders him unfit for the performance of the duties of the position in which he seeks employment, or which may reasonably be expected to render him unfit to continue to perform the duties of such position; or

(c) who is addicted to the use of narcotics, or who is addicted to the use of intoxicating beverages to excess; or

(d) who has been guilty of a crime or of infamous or notoriously disgraceful conduct; or

(e) who has been dismissed from a permanent position in the public service upon stated written charges of incompetency or misconduct, after an opportunity to answer such charges in writing, or who has resigned from, or whose service has otherwise been terminated in, a permanent or temporary position in the public service, where it is found after appropriate investigation or inquiry that such resignation or termination resulted from his incompetency or misconduct; or

(f) who has intentionally made a false statement of any material fact in his application; or

(g) who has practiced, or attempted to practice, any deception or fraud in his application, in his examination, or in securing his eligibility or appointment; or

(h) who has been dismissed from private employments because of habitually poor performance.

No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons

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therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

Notwithstanding the provisions of this subdivision or any other law, the state civil service department or appropriate municipal commission may investigate the qualifications and background of an eligible after he has been appointed from the list, and upon finding facts which if known prior to appointment, would have warranted his disqualification, or upon a finding of illegality, irregularity or fraud of a substantial nature in his application, examination or appointment, may revoke such eligible's certification and appointment and direct that his employment be terminated, provided, however, that no such certification shall be revoked or appointment terminated more than three years after it is made, except in the case of fraud.

Affidavit of Elliot H. Velger in Opposition to
Motion For Summary Judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLIOTT H. VELGER,

Plaintiff,

- against -

DONALD F. CAWLEY, Police Commissioner,
City of New York, et al.,

Defendants.

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

ELLIOTT H. VELGER, being duly sworn, deposes and
says:

1. I am the plaintiff herein and submit this affidavit in
reply to the affidavit of Assistant Corporation Counsel IRWIN L. HERZOG
and in opposition to defendants' motion for summary judgment.

2. My summary dismissal from the Police Department,
City of New York, after more than three years of continuous employment
without charges, without a hearing, and without being given the reasons
therefor, has operated to my prejudice.

3. I have had considerable difficulty obtaining employment
in private industry. As soon as the prospective employer is advised of
my dismissal from the Police Department, City of New York, I am
rejected.

4. On September 10, 1973, I was hired by the PENN-CENTRAL RAILROAD POLICE DEPARTMENT as a PATROLMAN. I was required to serve a probationary period of three months. On November 12, 1973, my employment was terminated by the PENN-CENTRAL RAILROAD POLICE DEPARTMENT solely because of my dismissal from the New York City Police Department. I was further advised that my termination was necessary because of derogatory entries made in my personnel folder while in the Police Department.

5. I have filed applications and have successfully competed in a number of civil service examinations for New York State and New York City positions. No one is barred from filing an application or taking an examination. I received passing grades for each of the examinations which I took, to wit: Police Administrative Aide, New York City Police Department; New York State Police Trooper; Yonkers, New York Police Department; Suffolk County, New York Police Department; Bridge and Tunnel Officer; and the recent examination for Patrolman, Police Department, City of New York. I also successfully passed other New York City positions which were of a non law-enforcement nature.

6. At the present time, I am unable to state whether the New York City Civil Service Commission or the New York State Civil Service Commission will disqualify me and mark me ineligible for appointment to the various positions for which I successfully competed. It is respectfully requested therefore, that this Honorable Court hold

in abeyance its decision as to whether or not I will be or have been disqualified for future civil service employment pending final action to be taken by said Commissions on my eligibility for appointment to the other civil service positions for which I passed the examinations.

7. It might not be amiss to point out that I have also successfully competed in competitive civil service examinations outside the State of New York and in the Federal Civil Service for law-enforcement positions. I have not as yet been certified for appointment to any of the positions for which I successfully competed.

8. This Court should judicially note that in every application for a civil service position, the candidate is required to disclose whether he had ever been dismissed from a civil service position. In all of the applications which I filed as indicated above, I set forth the fact that I was dismissed from the Police Department, City of New York, and also stated that this action was pending in this Court. All of the other agencies, both City, State, Federal and outside the State of New York, have requested me to sign an authorization permitting each of said agencies to obtain from the Police Department, City of New York, its personnel records pertaining to my employment.

9. I was terminated by the PENN-CENTRAL RAILROAD POLICE DEPARTMENT because of my record of employment in the Police Department, City of New York. I do not know what is in my personnel file. I have never seen nor have I ever been advised of any

derogatory matter being placed in my file. I was never given an opportunity to reply or to rebut any such statements. Under the circumstances, since I am being deprived of my right to earn a living, I respectfully submit that the action of the Police Department, City of New York, in failing and refusing to divulge to me the reasons for my dismissal and give me an opportunity to reply to any derogatory matter, is in violation of my constitutional rights to due process.

10. The operating officials of the agency could not make adverse unilateral determinations and findings against me and place these derogatory statements in my personnel folder. I was entitled to notice and an opportunity to reply. Dismissal from the Police Department creates a stigma and prevents me from earning a livelihood. My right to procedural due process and the equal protection of the laws have been violated. I have a constitutionally protected interest and the unilateral action on the part of the agency was an adjudication of fact in which I had a property interest. Rudimentary procedural guarantees under the Fifth Amendment were violated. This is an issue which should be tried before this Court.

11. Further, the need for fairness is as urgent in the constitutional right to earn a living as elsewhere in the law, and as a general matter, the furnishing of reasons for denial would be the much fairer course. This would enable a reviewing Court to determine whether inadmissible factors have influenced the decision, and to

determine whether discretion has been abused or civil and legal rights violated.

12. Should this Honorable Court be reluctant to set this issue down for trial, then I respectfully suggest that the personnel records be made available for the Court's inspection to determine whether or not the derogatory matters contained in my file should remain and operate to my detriment and prejudice the rest of my life.

WHEREFORE, it is respectfully requested that the motion for summary judgment be denied and that the matter be set down for trial. In the alternative, my personnel records should be produced for inspection and review by the Court.

Elliott H. Velger

Sworn to before me this
20th day of February 1974.

Montgomery
MONTGOMERY, State of Illinois
Jared, Public Defender
Quincy, Adams County
Notary Public, State of Illinois
1974

ENDORSEMENT

VELGER

v.

CAWLEY, et al.

Civil Action
No. 73-2350

In view of plaintiff's affidavit in opposition to the defendants' motion for summary judgment, I will deny summary judgment and suggest that plaintiff serve an amended complaint incorporating the substance of his affidavit. If this is done promptly, discovery may proceed with a view to trial of the action in June.

So ordered.

/s/ MURRAY L. GURFEIN
U. S. D. J.

February 26, 1974

CITY OF NEW YORK

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OFFICE OF CORPORATE COUNSEL

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLIOTT H. VELGER,

Plaintiff,

- against -

DONALD F. CAWLEY, Police Commissioner,
City of New York, PATRICK V. MURPHY,
former Police Commissioner, City of
New York, THE CITY OF NEW YORK, HARRY
I. BRONSTEIN, Personnel Director and
Chairman, New York City Civil Service
Commission, and ABRAHAM D. BEAME, as
Comptroller, City of New York,

CIVIL ACTION
No. 73-2350

Defendants.

PRELIMINARY STATEMENT

(1) This action was instituted on May 25, 1973. By notice of motion dated June 11, 1973, defendants moved to dismiss the action. This Court (GURFEIN, U.S.D.J.) denied the motion to dismiss, etc. (366 F. Supp. 874). Thereafter, by affidavit duly sworn to February 6, 1974, defendants moved for summary judgment. An affidavit in reply was submitted in opposition. GURFEIN, J., by an endorsement entered on or about February 28, 1974, granted plaintiff leave to submit an amended complaint.

AMENDED COMPLAINT FOR A WRIT OF
MANDAMUS; PRELIMINARY INJUNCTION;
PERMANENT INJUNCTION, and FOR
DECLARATORY JUDGMENT FIXING AND
DETERMINING THE RIGHTS OF PLAINTIFF.

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JURISDICTION

(2) Plaintiff, a citizen of the United States and of the State of New York, successfully competed in an open competitive written examination for PATROLMAN, POLICE TRAINEE, POLICE DEPARTMENT, CITY OF NEW YORK. He was duly appointed from an eligible list duly established by defendant NEW YORK CITY CIVIL SERVICE COMMISSION as a result of said examination on January 31, 1970. On February 16, 1973, he was dismissed from his position of PATROLMAN on probation without charges and without a hearing.

Jurisdiction is conferred upon the Court as follows:

- (a) Section 1331, Title 28, U.S.C., in that the damages to plaintiff exceeds \$10,000.00 and the matter arises under the United States Constitution, laws and treaties;
- (b) The Fourteenth Amendment to the Constitution of the United States;
- (c) The First Amendment to the Constitution of the United States;
- (d) 28 U.S.C. 1343 (3) (4) in that plaintiff seeks relief under 42 U.S.C. 1981 and 1983 and alleges deprivation under color of state laws, of rights, privileges or immunities secured by the Constitution of the United States, or by Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States;
- (e) Plaintiff's action for declaratory and injunctive relief and for damages is authorized by:
 - 1. 28 U.S.C. Sections 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure which relate to declaratory judgments, and

2. 42 U.S.C. Section 1983 which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

(f) Title 28, U.S.C. Sections 2281 and 2284 to declare Sections 3 of the New York Public Officers Law and Section 58 of the New York Civil Service Law unconstitutional.

BASIS FOR ACTION

(3) Plaintiff is a citizen of the United States and of the State of New York. The defendant New York City Civil Service Commission duly announced an open competitive written examination for the position of Patrolman, Police Trainee, Police Department, City of New York. Plaintiff filed a written application to compete in said examination. The Civil Service Commission after having conducted an investigation determined that plaintiff met all of the eligibility requirements for the position and permitted plaintiff to compete in said examination. Plaintiff successfully competed in said written examination. Thereafter, he passed the required medical and physical tests and the Civil Service Commission certified plaintiff as eligible for appointment as Patrolman, Police Trainee. The Police Department, City of New York, conducted its own investigation, and after a pre-appointment physical examination and an investigation of plaintiff's police record, scholastic background and employment, the then Police Commissioner of the City of New York appointed plaintiff to the position of Police Trainee on January 31, 1970.

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(4) Prior to his appointment as a Patrolman, it was incumbent upon plaintiff to purchase the necessary equipment, gear and uniform which approximated \$500.00. On January 31, 1970, plaintiff enrolled in the John Jay College of Criminal Justice and Long Island University, which were federally funded programs. At the time of his dismissal as hereinafter alleged, plaintiff had earned 22 credits at the John Jay College of Criminal Justice and 21 credits at Long Island University.

(5) The civil service announcement released by the defendant New York City Civil Service Commission, provided as follows (Schedule "B"):

"PATROLMEN, POLICE TRAINEE

(Police Department)

This examination is open only to men. A single list will be established from this examination and appointments will be made to either Patrolman or Police Trainee (Police Department) depending on age.

Police Trainee is a trainee class of positions. A Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without taking any further written or physical tests, provided he has a satisfactory record as trainee and provided he passes a medical test identical to the one given to Patrolman candidates."

(6) Plaintiff's employment as a Police Trainee was satisfactory. On August 8, 1972, plaintiff became twenty-one years

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of age. On August 15, 1972, plaintiff was promoted to the position of Patrolman on probation. There was no break or interruption in plaintiff's employment which commenced on January 31, 1970. At the time of his promotion, plaintiff's salary was increased from \$6400.00 to \$10,699.00 per annum.

(7) While at the Police Academy attending lectures and class sessions, plaintiff and others similarly situated did express opinions as to orientation, criminal enforcement, etc., which were contrary to the Superior Officer's views. On occasion, plaintiff was informed that his views were contrary to established police procedure. Plaintiff, however, was neither served with charges nor officially reprimanded with respect thereto.

(8) On February 16, 1973, plaintiff received a written notice which advised him that the Police Commissioner had decided not to retain him as an employee of the Police Department - "your capacity having been unsatisfactory to the Police Commissioner" (Schedule "A" is a copy). At the time of his dismissal, plaintiff was earning \$11,200.00 per annum. Because of said dismissal, plaintiff was compelled to discontinue his courses at the John Jay College of Criminal Justice and Long Island University which would have culminated in a Police Science Degree. Both Universities are now claiming reimbursement.

(9) At the time of his dismissal, plaintiff was not served with written charges and specifications and was not given a hearing. His summary dismissal besides being arbitrary,

capricious and unreasonable, was in violation of plaintiff's constitutional right to procedural due process and the equal protection of the laws. Plaintiff could not be dismissed at will.

(10) Having been dismissed from his position with defendant Police Department, plaintiff experienced considerable difficulty in obtaining employment. According to plaintiff's affidavit sworn to February 20, 1974, he was hired by the PENN-CENTRAL RAILROAD POLICE DEPARTMENT as a Patrolman and was required to serve a probationary period of three months. On November 12, 1973, his employment was terminated solely because of the derogatory remarks and entries which were made and entered in his personnel folder while in the Police Department. Plaintiff was not aware of the derogatory remarks and entries which were placed in his personnel folder.

(11) According to plaintiff's affidavit sworn to February 20, 1974, plaintiff successfully competed in a number of competitive civil service examinations for New York City, New York State and Federal positions. Many of the positions were law-enforcement while others were of a non law-enforcement nature. Plaintiff received passing grades in the examinations for Police Administrative Aide, New York City Police Department; Bridge and Tunnel Officer, New York City, and the recent examination for Patrolman, Police Department. In the interest of expediency and to avoid duplication, the said affidavit is incorporated by reference as part of this amended complaint. Nevertheless, as part of plaintiff's disqualification because of

his dismissal from the New York City Police Department as aforesaid, defendant Civil Service Commission refused and has failed to mark plaintiff eligible and certify him for appointment to all other New York City positions even though he passed the competitive civil service examinations for said positions.

(12) Plaintiff was terminated by the Penn-Central Railroad Police Department because of his record of employment in the Police Department, City of New York. Plaintiff claims he does not know the contents of his personnel file and has never seen or been advised of any derogatory matter placed in his file. He was never given an opportunity to reply or to rebut any such statements. Plaintiff is being deprived of his right to earn a living.

FIRST CAUSE OF ACTION

(13) The refusal and failure on the part of the local Police Department officials to specifically state the reasons for plaintiff's dismissal and afford him an opportunity to rebut and contradict any accusations made against him was and is contrary to BOARD OF REGENTS v. ROTH, 408 U.S. 546; PERRY v. SINDERMAN, 408 U.S. 593, and GOLDBERG v. KELLY, 397 U.S. 254.

SECOND CAUSE OF ACTION

(14) The Civil Rights Act prohibits discrimination in employment because of race, creed, color, religion or national origin. Because of the refusal and failure on the part of the

local Police Department officials to specifically advise plaintiff of the reasons for his dismissal, plaintiff is unable to determine whether his civil rights were violated and therefore alleges that his summary dismissal under the circumstances was illegal and improper.

THIRD CAUSE OF ACTION

(15) By refusing and failing to specifically advise plaintiff of the reasons for his dismissal and to afford him an opportunity to controvert the basis for the alleged dismissal, plaintiff has been denied procedural due process and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

FOURTH CAUSE OF ACTION

(16) The refusal and failure on the part of defendants to give specific reasons for the dismissal of plaintiff was and is in violation of his First and Fourteenth Amendment rights to the Constitution of the United States and denies to plaintiff his right to earn a livelihood. Plaintiff had a property right to his position which could not be summarily taken away. As a result of said dismissal, plaintiff's name has been placed on a list which disqualifies him from competing in Civil Service examinations for employment in the City and State of New York for at least one year.

FIFTH CAUSE OF ACTION

(17) The local Police officials have intentionally and purposefully discriminated against plaintiff. Their action is invidious and intentional and was and is intended to deny to plaintiff his constitutional right to hold public office.

SIXTH CAUSE OF ACTION

(18) The action on the part of the Police Department employees by inserting derogatory matter, comments and remarks in plaintiff's personnel folder without affording plaintiff an opportunity to see, inspect, reply and to rebut such statements, has damaged plaintiff's standing in the community and has foreclosed his freedom to take advantage of other employment opportunities. The stigma of unreliability and incompetency, etc., has barred plaintiff from earning a livelihood.

SEVENTH CAUSE OF ACTION

(19) Plaintiff under the First Amendment had the right to exercise free speech and was within his rights to offer constructive and salutary suggestions during lecture classes at the Police Academy. Plaintiff's remarks were neither offensive nor officious but were made in good faith.

EIGHTH CAUSE OF ACTION

(20) Pursuant to the provisions of 28 U.S.C., Sections 2281 and 2284, a three-judge court should be convened to declare Sections 3 of the New York Public Officers Law and Section 58 of the New York State Civil Service Law unconstitutional upon the ground that said sections are discriminatory, contradictory and unduly restrictive, in that it denies to plaintiff the right to be a Patrolman, Police Department, City of New York, because of his age and violates his procedural rights to due process and the equal protection of the laws.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this Honorable Court:

- A. Issue a writ of mandamus directing defendants to reinstate plaintiff to his quondam position of PATROLMAN, POLICE DEPARTMENT, CITY OF NEW YORK, retroactive to February 16, 1973;
- B. To convene a three-judge court to declare Section 3 of the New York Public Officers Law and Section 58 of the New York Civil Service Law unconstitutional.
- C. Enter a declaratory judgment against all defendants declaring that the action of defendants in terminating plaintiff's employment without charges and without

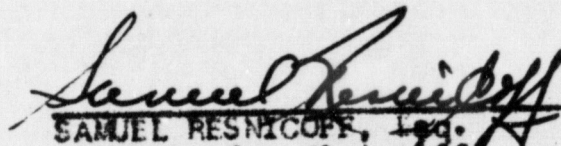
a hearing to be in violation of the Constitution of the United States, in that it denies to plaintiff procedural due process and the equal protection of the laws;

D. Grant a temporary restraining order restraining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from continuing to cause irreparable harm to plaintiff by refusing to employ him in his position and to employ him in civil service positions in the competitive class to which he may be entitled and that would otherwise be available except for the illegal action on the part of defendants;

E. Enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to employ plaintiff in his position of Patrolman, Police Department, City of New York;

- F. Enter a final judgment in favor of plaintiff vacating, annulling and setting aside his dismissal from his competitive civil service position of Patrolman which was accomplished without charges and without a hearing on February 16, 1973;
- G. Grant plaintiff damages in the sum of \$50,000.00 because of the injury to plaintiff's reputation and good name resulting in the severe limitation of future employment opportunities;
- H. That this Court retain jurisdiction of this action until such time as defendants comply with the provisions of the First and the Fourteenth Amendments and the statutes enumerated above, and
- I. Grant plaintiff such additional alternative relief as may seem to this Court to be just, proper and equitable.

Respectfully submitted,


SAMUEL RESNICOFF, Esq.
Attorney for Plaintiff
Office & P. O. Address
280 Broadway
New York, New York 10007
(Digby 9-3896)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ELLIOT H. VELGER,

Plaintiff,

M I G.

-against-

ANSWER

DONALD F. CAWLEY, Police Commissioner,
City of New York, PATRICK V. MURPHY,
former Police Commissioner, City of
New York, THE CITY OF NEW YORK,
HARRY I. BRONSTEIN, Personnel Director
and Chairman, New York City Civil
Service Commission, and ABRAHAM D.
BIAME, as Comptroller, City of
New York,

73 Civ 2350

Defendants.

-----x

Defendants, answering the complaint herein by their attorney, ADRIAN P. BURKE, Corporation Counsel of the City of New York, respectfully allege as follows:

1. Deny each and every allegation contained in paragraph "2" thereof, except admit that plaintiff is a former probationary patrolman employed by the New York City Police Department who was terminated during his probationary period without reasons or a hearing on February 16, 1973, after successfully competing in an open competitive civil service examination for Patrolman/Police Trainee.

2. Admit the allegations contained in paragraph "3" thereof, except deny that the Civil Service Commission "determined that plaintiff met all of the eligibility requirements for the position" [of probationary patrolman] and further deny that the Police Department conducted an investigation of plaintiff prior to his appointment as a probationary patrolman.

3. Deny each and every allegation contained in paragraph "4" thereof which states or implies that plaintiff was ever appointed Patrolman and further deny knowledge or information sufficient to form a belief as to the truth of the allegations relating to plaintiff's education.

4. Deny each and every allegation contained in paragraph "5" thereof, especially deny that there is a "Schedule" B annexed to the amended complaint and respectfully refer the court to the Notice of Examination annexed hereto as Exhibit "I" for the full text and legal effect thereof.

5. Admit the allegations contained in paragraph "6" thereof, except deny that plaintiff's employment as a Police Trainee was satisfactory.

6. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph "7" thereof, except admit that plaintiff was never reprimanded or served with charges due to his opinions offered while he was at the Police Academy or at any other time.

7. Deny each and every allegation contained in paragraph "8" thereof and especially deny that Schedule "A" is annexed to the amended complaint, except admit that on February 16, 1973, plaintiff received a written notice advising him that the Police Commissioner had determined not to retain him as an employee of the Police Department.

8. Deny each and every allegation contained in paragraph "9" thereof, except admit that plaintiff, a probationary employee, was not served with written charges and specifications or given a hearing prior to his dismissal.

9. Deny each and every allegation contained in paragraph "10" thereof.

10. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph "11" thereof and further deny that the defendant Civil Service Commission has refused to mark plaintiff eligible or certify him for appointment to other positions due to his dismissal from the Police Department.

11. Deny each and every allegation contained in paragraph "12" thereof, except deny information or knowledge sufficient to form a belief as to why plaintiff was terminated by the Penn Central Railroad Police Department.

12. Deny each and every allegation contained in paragraph "13" thereof.

13. Deny each and every allegation contained in paragraph "14" thereof, and respectfully refer the Court to the Civil Rights Act for the full text and legal effect thereof.

14. Deny each and every allegation contained in paragraphs "15", "16", "17", "18", "19" and "20" thereof.

FURTHER ANSWERING THE COMPLAINT HEREIN, AND
AS AND FOR A FIRST SEPARATE AND COMPLETE
DEFENSE THERETO, DEFENDANTS RESPECTFULLY
ALLEGE:

15. The complaint fails to state facts sufficient to constitute a claim for relief and should be dismissed as a matter of law.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

16. Plaintiff's employment as a Patrolman was at all times in a probationary capacity. Plaintiff never received a permanent appointment and was never permanently employed or guaranteed permanent employment by the Police Department.

17. In terminating plaintiff, defendants made no charges against him impugning either his honesty or integrity.

18. Plaintiff's termination in no way foreclosed his future employment.

19. Plaintiff was therefore not deprived of either property or liberty by his termination.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN, DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

20. Plaintiff's claim that he has been denied due process of law has already been adjudicated by this court and should not be re-litigated.

AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN, DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

21. Section 3 of the New York Public Officers Law is in all respects legal, proper and constitutional.

22. Section 58 of the New York Civil Service Law is in all respects legal, proper and constitutional.

23. Accordingly, plaintiff's allegations that these two statutes are unconstitutional are frivolous and no three judge court should be convened.

AS AND FOR A FIFTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN, DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

24. Plaintiff has not been injured by the operation of Section 3 of the New York Public Officers Law or by Section 58 of the New York Civil Service Law.

25. Accordingly, plaintiff has no standing to challenge the aforementioned statutes.

AS AND FOR A SIXTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN, DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

26. Plaintiff has at no time been punished, served with charges, reprimanded, suspended, dismissed or in any other way disciplined by the defendants for his statements or opinions expressed at any time.

27. Plaintiff's rights guaranteed by the First Amendment to the United States Constitution have not been limited, abridged, violated, chilled or trammelled upon by the defendants in any way.

AS AND FOR A SEVENTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN, DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

28. There is no rule, regulation or policy by which the Civil Service Commission disqualified plaintiff due to his dismissal by the Police Department. For a further rebuttal of plaintiff's claim that he has been disqualified for

future civil service employment, the court is respectfully referred to the affidavit of IRWIN L. HERZOG, annexed hereto as Exhibit "II."

AS AND FOR AN EIGHTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN, DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

29. The individual defendants herein are named only in their official capacities, and in such capacity are not "persons" within the meaning of 42 USC §§1981 and 1983 and therefore are not liable to plaintiff and this court lacks jurisdiction over the subject matter.

30. Even if found amenable to suit under 42 USC §§ 1981 and 1983, the individual defendants herein have at all times acted legally, constitutionally and in good faith and hence are not liable to plaintiff for damages under any legal theory.

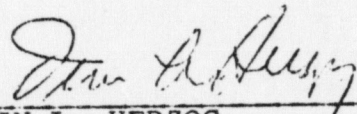
AS AND FOR A NINTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT HEREIN, DEFENDANTS RESPECTFULLY ALLEGE AS FOLLOWS:

31. The defendant City of New York is a governmental entity and not a "person" within the meaning of 42 USC §§1981 and 1983 and therefore is not liable to plaintiff.

WHEREFORE, defendants pray that this court grant judgment in their favor dismissing the complaint with pre-judgment and further grant defendants the costs of this action.

ADRIAN P. BURKE
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007
Tel.: 566-2183/2192

By



IRWIN L. HERZOG
Assistant Corporation Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ELLIOTT H. VELGER,

73 Civ. 2350

Plaintiff,

-against-

INTERROGATORIES

DONALD F. CAWLEY, Police Commissioner,
City of New York, et al.,

Defendants.
-----X

TO: Samuel Resnicoff, Esq.
Attorney for Plaintiff
Municipal Building
New York, New York 10007

The defendants request that plaintiff serve on the undersigned an answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure to the following interrogatories within thirty (30) days after service hereof:

INTERROGATORY 1

State with particularity the dates, times, places and persons to whom plaintiff expressed opinions referred to in paragraph "7" of the complaint. State with particularity the person or persons who allegedly informed plaintiff his views were contrary to established police procedure, the date and place of such discussion and what disciplinary action, if any, resulted from such opinions.

INTERROGATORY 2

In connection with the allegations contained in paragraph "10" of the complaint, state with particularity the exact reasons for his termination by the Penn Central

Railroad Department. State with particularity the exact derogatory remarks allegedly contained in the Police Department personnel folder. In connection with these allegations, defendants demand plaintiff furnish defendants with

(a) a full copy of his employment record with Penn Central Railroad;

(b) the written reasons for his termination by the Penn Central Railroad;

(c) whatever other evidence, documentary or otherwise, plaintiff has which led him to conclude the aforementioned derogatory remarks in the Police Department personnel folder led to his dismissal by the Penn Central Railroad and

(d) the name, address and official title of plaintiff's immediate supervisor while he was employed by the Penn Central Railroad and the name, address and official title of the person or persons who had the authority to terminate plaintiff.

INTERROGATORY 3

In connection with the allegations contained in paragraph "11" of the amended complaint, state each and every civil service examination plaintiff has taken, both law enforcement and non-law enforcement. With reference to said examinations, defendants demand plaintiff furnish

(a) the examination number of each and every civil service examination plaintiff has taken, Federal, State and municipal;

(b) plaintiffs particular number on each and every aforementioned civil service examination;

(c) plaintiff's grade and list number on each and every aforementioned civil service examination;

(d) the dates of appointment, if any, resulting from the aforementioned civil service examinations, or if plaintiff received no appointments, the reasons why plaintiff was not appointed to a position as a result of competing in said civil service examination;

(e) if the reasons for such non-appointments be in writing, a copy of such document.

INTERROGATORY 4

In connection with the allegations in paragraph "8" of plaintiff's affidavit in opposition to defendants' motion for summary judgment (incorporated in the amended complaint, paragraph "11"), state with particularity what agency or agencies requested permission to request plaintiff's personnel records pertaining to his employment with the New York City Police Department. State with particularity the agency or agencies which received any such personnel records from the Police Department. State with particularity how plaintiff knows whether or not the personnel records were furnished and if such knowledge arises from a writing, defendants demand plaintiff furnish them a copy of such writing.

INTERROGATORY 5

State with particularity precisely which subsection or subsections of §58 of the Civil Service Law are uncon-

stitutional and the alleged reasons therefor. State with particularity the exact manner in which the alleged unconstitutionality of said subsection or subsections has injured plaintiff. State precisely which constitutional provision or provisions are violated by §58 of the Civil Service Law.

INTERROGATORY 6

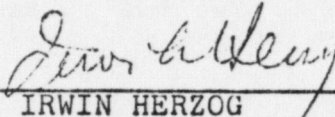
State with particularity precisely which subsection or subsections of §3 of the Public Officers Law is unconstitutional. State with particularity which Constitutional provision or provisions said subsection or subsections violate. State precisely how the alleged unconstitutionality of §3 of the Public Officers Law has injured plaintiff.

INTERROGATORY 7

State in detail what statutes, ordinances, rules, regulations, charter provisions, code provisions, contracts, agreements, policies, guarantees or other reasons whether documentary or otherwise which support plaintiff's allegation that he has a claim of entitlement to the position of Patrolman. If such evidence be in writing or be capable

of reduction to writing, defendants request that plaintiff furnish a copy of such document or writing to defendants' attorney.

ADRIAN P. BURKE
Corporation Counsel
Attorney for Defendants
Office and P.O. Address:
Municipal Building
Borough of Manhattan
New York, New York 10007
Tel: 566-2183/2192


By: IRWIN HERZOG
Assistant Corporation Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLIOTT H. VELGER,

Plaintiff,

- against -

DONALD F. CAWLEY, Police Commissioner,
City of New York, PATRICK V. MURPHY,
former Police Commissioner, City of
New York, THE CITY OF NEW YORK, HARRY
I. BRONSTEIN, Personnel Director and
Chairman, New York City Civil Service
Commission, and ABRAHAM D. BEAME, as
Comptroller, City of New York,

Defendants.

Plaintiff in response to the Interrogatories,
submits the following answers:

ANSWERING INTERROGATORY 1:

I am unable to state with any particularity the dates or times of the conversations referred to in paragraph 7 of the amended complaint, other than to state that before and after classes in conversations with other probationary patrolmen, I did state with respect to arrest, search and seizure, that in my opinion this area of the law was unsettled and many New York cases conflicted with Federal decisions. I further state that on at least one occasion, one of the Instructors whose name I do not recall, advised me that my theories and opinions were incorrect. I do not recall the date and time of such discussion. No disciplinary action was taken against me.

ANSWERING INTERROGATORY 2:

In late August of 1973, I took a written examination and medical examination for the Penn-Central Railroad Police. On September 10, 1973, I was hired by Captain A. T. Dunn and ordered to report for a 4 P.M. to 12 midnight tour that day at the Weehawken Freight Yards in Weehawken, New Jersey. I worked from September 10th to October 1st at the Weehawken Yards performing Radio Motor Patrol and related functions under the supervision of Lieut. C. ROE.

October 1, 1973, I was transferred on regular rotation to the Truck-Train Yard at South Kearny, New Jersey. I worked at the Truck-Train Yard performing Foot and Radio Motor Patrol. Several times I was sent outside the yard to perform Plainclothes Duty with an experienced Patrolman. I arrested one (1) youth in that time who was turned over to my partner for processing.

On November 2, 1973, I was called down to Penn-Central Police Headquarters at 12 midnight after my working tour had ended. Waiting for me there was a typed release giving the Penn-Central Police Department authority to view any and all personnel records on file with the New York City Police Department. I had been ordered by Lieut. L. H. HAMILTON, my investigating officer, to sign this release and I did sign it.

On November 12, 1973, Lieut. L. H. HAMILTON called me on the telephone and ordered me to bring all my working equipment that had been issued to me down to Penn-Central Police Headquarters.

When I arrived, I was ordered to turn in my Shield, handcuffs, memobook and all other equipment issued to me. I was informed by Captain R. STEPLE that I was being fired because of certain incidents which occurred at the New York City Police Academy that were disclosed in my personnel files. He further stated that although my work performance was more than satisfactory, the Superintendent of Police, James Farrell, had passed the decision down and that I could not appeal this decision in any way. After discussing this matter with Captain Steele, he finally allowed me to sign a resignation form so that no stigma would be attached to my being fired from the Department.

By letter dated January 15, 1974, I wrote Mr. FARRELL and inquired "What prompted your decision to terminate my employment? There was no response.

ANSWERING INTERROGATORY 3:

I FEDERAL EXAMINATIONS:

- 1) United States Postal Service
Clerk-Carrier Examination

Exam Date: 5/2/73 Exam No.: None Application No. 350982
Score: 70.3 List No.: Unknown

I was called down to the General Post Office in the Bronx for a Pre-appointment Investigation and medical examination in early December, 1973. I received no confirmation of hiring within the next two weeks. When I telephoned their personnel department, I was informed that I was ineligible and no longer under consideration due to my background.

2) Executive Protective Service Officer
United States Secret Service

Exam Date: 11/17/73 Exam No.: None Application No.: None
Score: 91.25 List No.: Unknown

I was called down for a personal interview on November 18, 1973. I was informed by my interviewer that hiring would begin on January 15, 1974, and that I would be among the first considered due to my high test score. I declined to supply background investigational data because of what occurred when I released records to the Penn-Central Railroad Police. I am no longer under consideration for this position.

3) Metropolitan Police Officer
Washington, D. C.

Exam Date: 2/6/74 Exam No.: WA3-01 Application No.: Unknown
Score: 92.5 List No.: Unknown I.D. No.: 4

I am presently awaiting appointment to this position.

4) Federal Service Entrance Examination (FSEE)
For Customs Inspector and Criminal Investigator

Exam Date: 3/5/74 Exam No.: 410 Application No.: Unknown
Score: Unknown List No.: Unknown I.D. No.: 808317

I have not yet received my score from the United States Civil Service Commission.

II NEW JERSEY STATE MUNICIPAL EXAMINATIONS:

1) Police Officer Jersey City, New Jersey

Exam Date: 8/6/73 Exam No.: M1098P Application No: 056448090
Score: 73.653 List No.: 311

I am presently awaiting appointment to this position.

2) Police Officer Plainfield, New Jersey

Exam Date: 8/6/73 Exam No.: M1103P Application No.: 056448090
Score: 73.653 List No.: 117

I was called down for appointment to this position on February 12, 1974. I supplied background investigational data to the Plainfield Police Department. My name was passed over for appointment.

III NEW YORK STATE AND MUNICIPAL EXAMINATIONS:**1) New York State Police Trooper**

Exam Date: 3/17/73 Exam No.: Unknown Application No.: 16436
Score: 83.833 List No.: 02105

I am presently awaiting appointment to this position.

2) Police Officer Suffolk County, New York

Exam Date: 10/13/73 Exam No.: 13-214 Application No.: None
Score: 79.0 List No.: None

I failed to achieve a mark high enough to pass the qualifying physical examination. I am no longer under consideration for appointment.

3) Police Officer Yonkers, New York

Exam Date: 10/13/73 Exam No.: 65-674 Application No.: None
Score: 79.0 List No.: Unknown

I am presently awaiting appointment to this position contingent upon passing a physical examination.

IV NEW YORK CITY MUNICIPAL EXAMINATIONS:**1) Police Administrative Aide**

Exam Date: 6/73 Exam No.: 2026 Application No.: 11731
Score: 77.5 List No.: 3268

I am presently awaiting appointment to this position.

IV NEW YORK CITY MUNICIPAL EXAMINATIONS: (Continued)**2) Patrolman-Policewoman New York City Police Department**

Exam Date: 12/15/73 Exam No.: 3014 Application No.: 04932
Score: Unknown List No.: Unknown

I have not yet received my official test score and list number from the Department of Personnel. According to the Unofficial Answer Key that was released, my score is 89%.

3) Bridge and Tunnel Officer

Exam Date: 2/2/74 Exam No.: 3054 Application No.: None
Score: Unknown List No.: Unknown

I have not yet received my official test score and list number from the Department of Personnel. According to the Unofficial Answer Key that was released, my score was 94%.

- 4) Jan Cleaner and Caretaker
New York City Transit Authority

Exam Date: 2/9/74 Exam No.: None Application No.: Unknown
Score: Unknown List No.: Unknown

I have not yet received my official test score from the New York City Transit Authority.

- 5) Sanitation Man New York City

Exam Date: 3/2/74 Exam No. 3090 Application No.: 32840
Score: Unknown List No.: Unknown

I have not yet received my official test score from the Department of Personnel. According to the Unofficial Answer Key that was released, my score is 100%.

- 6) Railroad Clerk New York City Transit Authority

Exam Date: 3/23/74 Exam No.: 3020 Application No.: None
Score: Unknown List No.: Unknown

I have not yet received my official test score or list number from the Department of Personnel.

- 7) Corrections Officer New York City

Exam Date: 3/30/74 Exam No.: 4003 Application No.: 00758
Score: Unknown List No.: Unknown

I have not yet received my official test score from the Department of Personnel.

ANSWERING INTERROGATORY 4:

To the best of my recollection, most if not all of the public agencies requested my permission to obtain my personnel records from the New York City Police Department. I am unable to state which of said agencies obtained said records. I was not supplied with a copy of the records or any writings.

ANSWERING INTERROGATORY 5:

The constitutionality of a state statute is a question of law and not one of fact. I am a layman and therefore not in a position to take an oath on the law. However, Section 58 of the Civil Service Law is discussed in our supplemental brief dated October 12, 1973, a copy of which was served upon defendants' attorney.

ANSWERING INTERROGATORY 6:

The constitutionality of a state statute is a question of law and not one of fact. I am a layman and therefore not in a position to take an oath on the law. However, Section 3 of the Public Officers Law is discussed in our supplemental brief dated October 12, 1973, a copy of which was served upon defendants' attorney.

ANSWERING INTERROGATORY 7:

I became 21 years of age on August 8, 1972. Pursuant to the civil service announcement (Schedule "B") for the position in question, the notice provided that "a Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday ***." Despite the denial by defendants, I was appointed a regular Patrolman on August 15, 1972. As a permanent employee, I acquired tenure and status, and had a property interest to my position. I could not be removed without charges and without a hearing.

It is also my belief that the section which imposes a minimum age limit of 21 in order to be a Patrolman in the Police Department, City of New York, is discriminatory.

Elliott H. Velger

Sworn to before me this

9th day of May 1974.

BRETA LA PATIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-7428450 Qual. in Kings Co
Certificate filed in New York County
Commission Expires March 30, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLIOTT H. VELGER,

Plaintiff,

- against -

DONALD F. CAWLEY, Police Commissioner,
City of New York, PATRICK V. MURPHY,
former Police Commissioner, City of
New York, THE CITY OF NEW YORK, HARRY
I. BRONSTEIN, Personnel Director and
Chairman, New York City Civil Service
Commission, and ABRAHAM D. BEAME, as
Comptroller, City of New York,

73 C. 2350

Defendants.

TO:-

Hon. ADRIAN P. BURKE
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, N.Y. 10007.

Plaintiff demands that defendant Police Commissioner, his subordinates, any official or employee of the Police Department having knowledge, serve upon the undersigned an answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, to the following Interrogatories within thirty (30) days after service of this demand:

INTERROGATORY 1

Set forth all the reasons why the Police Department terminated plaintiff on February 16, 1973, inasmuch as plaintiff was continuously employed by the Police Department since January 31, 1970.

INTERROGATORY 2

State whether any written or oral charges were preferred against petitioner prior to his dismissal, and if charges were preferred, set forth a copy.

INTERROGATORY 3

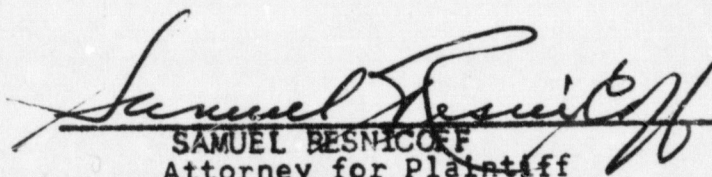
State whether petitioner was given a formal or informal hearing prior to his dismissal, and if a hearing or interrogation was conducted, set forth a verbatim transcript thereof.

INTERROGATORY 4

Set forth an exact copy of the letter, etc., forwarded by the Police Department to the PENN-CENTRAL RAILROAD POLICE DEPARTMENT, which set forth the reasons for plaintiff's termination by the Police Department.

INTERROGATORY 5

Set forth a copy of plaintiff's academic marks which he received while attending classes at the Police Academy.


SAMUEL BESNICOFF
Attorney for Plaintiff
Office & P. O. Address
280 Broadway
New York, N.Y. 10007

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ONLY COPY AVAILABLE
Answer to Interrogatories.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ELLIOTT H. VELGER,

Plaintiff,

v.

DONALD F. CAWLEY, Police Commissioner,
City of New York, PATRICK V. MURPHY,
former Police Commissioner, City of
New York, THE CITY OF NEW YORK, HARRY
I. BRONSTEIN, Personnel Director and
Chairman, New York City Civil Service
Commission, and ABRAHAM D. BEAME, as
Comptroller, City of New York,

Defendants.

MLG

73 Civ. 2350

ANSWERS TO
INTERROGATORIES

-----X
Defendants, answering the interrogatories herein
by their lawful representative state as follows:

INTERROGATORY 1:

Set forth all the reasons why the Police
Department terminated plaintiff on February
16, 1973, in as much as plaintiff was
continuously employed by the Police Department
since January 31, 1970.

ANSWER: This interrogatory is objectionable in that plain-
tiff was employed as a probationary patrolman at the time
of his termination and hence has no right to a statement of
reasons for his termination. Authorities in support of this
ground for objection include Board of Regents v. Roth, 408
U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 563 (1972);
Russell v. Hodges, 470 F. 2d 212 (2nd Cir. 1972); Lipp v.
Board of Education, 470 F. 2d 802 (7th Cir. 1972); Manzino

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Answer to Interrogatories.

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v. Elliott, (S.D.N.Y., 72 Civ. 3125, February 28, 1973) and the earlier opinion of this court, pp. 6-8 of the slip opinion dated October 31, 1973.

INTERROGATORY 2

State whether any written or oral charges were preferred against petitioner prior to his dismissal, and if charges were preferred, set forth a copy.

ANSWER: No written or oral charges were preferred against petitioner prior to his dismissal.

INTERROGATORY 3

State whether petitioner was given a formal or informal hearing prior to his dismissal, and if a hearing or interrogation was conducted, set forth a verbatim transcript thereof.

ANSWER: Petitioner was given no hearing prior to his dismissal. No interrogation was conducted.

INTERROGATORY 4

Set forth an exact copy of the letter, etc., forwarded by the Police Department to the PENN-CENTRAL RAILROAD POLICE DEPARTMENT, which set forth the reasons for plaintiff's termination by the Police Department.

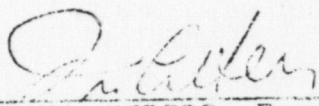
ANSWER: No letter or other document was forwarded to the Penn Central Railroad Police Department by respondents.

Answer to Interrogatories.

INTERROGATORY 5

Set forth a copy of plaintiff's academic marks which he received while attending classes at the Police Academy.

ANSWER: Petitioner completed three quarterly tests in the academic portion of his training, attaining grades of 72%, 82% and 80%.


IRWIN HERZOG, Esq.
Assistant Corporation Counsel

Sworn to before me this

10th day of September, 1974

DONALD J. TOBIAS
Notary Public, State of New York
No. 31-4512990
Qualified in New York County
Commission Expires March 30, 1978

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLIOTT H. VELGER,

Plaintiff,

-against-

DONALD F. CAWLEY, POLICE COMMISSIONER,
CITY OF NEW YORK, PATRICK V. MURPHY,
FORMER POLICE COMMISSIONER, CITY OF
NEW YORK, THE CITY OF NEW YORK,
HARRY I. BRONSTEIN, PERSONNEL DIRECTOR
AND CHAIRMAN, NEW YORK CITY CIVIL
SERVICE COMMISSION, et al.,

Defendants.

73 Civ. 2350

November 25, 1974

BEFORE:

HON. HENRY F. WERKER,

District Judge.

APPEARANCES:

SAMUEL RESNICOFF, ESQ.
Attorney for the Plaintiff

ADRIAN P. BURKE, ESQ.
(Corporate Counsel)
Attorney for the Defendants
BY: IRWIN L. HERZOG, ESQ.

75 FEB 6 PM 1:39
CITY OF NEW YORK
CLERK OF COURT

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2 (Case called.)

3 MR. RESNICOFF: Plaintiff is ready.

4 MR. HERZOG: Defendant is ready.

5 THE COURT: Mr. Resnicoff?

6 MR. RESNICOFF: Yes.

7 If your Honor please, before we proceed, I
8 preliminarily want to call your Honor's attention to the
9 fact that it is conceded in this case that the plaintiff
10 was dismissed or terminated without charges, without being
11 given a reason, and without being given a hearing. That
12 is conceded.

13 I also want to call your Honor's attention to
14 the fact that we are relying very heavily on the recent
15 decision handed down in July of this year by our Court of
16 Appeals for this Circuit in that Lombard case.

17 In that case the Court went so far as to hold
18 that the plaintiff there, who was a probationary nontenured
19 teacher, who was dismissed, that because of the stigma the
20 Court held that the plaintiff was entitled to a hearing and
21 reversed Judge Travia in the Eastern District, who had dis-
22 missed, even though the plaintiff in that action had brought
23 two Article 78 proceedings in the State Court, one of which
24 was affirmed by the Appellate Division, went up to the Court
25 of Appeals. But he came in under 1983 and 1343, and Judge

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Gurfein in a very luminous decision, which was well received in Civil Service circles, held that where there is a stigma and it affects a man's livelihood and his ability to earn a living, Federal Court has jurisdiction.

I want to point out to your Honor -- and I don't want to make a lengthy argument, because we are hoping we can finish the case today, and I think Mr. Herzog, my friend, joins me on the question of law -- but I did want to give you some slight testimony which I want to do, I expect a few witnesses here. And the case is not going to take too long, because I am going to get right down to the nitty gritty.

But one thing is certain, Judge, just as sure as we are here in your courtroom this morning: that where a policeman is terminated and is given no reason, aside from the unfairness of it, there is a stigma immediately. Because in the community where he lives, the stigma arises from criminality, that he is either a thief, a briber or an extortionist.

As he indicated in his reply, and that is the reason why Judge Gurfein said we had better go to trial on this in view of the reply affidavit where he denied the motion for summary judgment and said, where Velger pointed out his difficulty in getting a job or a comparable job, that

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there is a stigma.

That is the point in this case. Here is a young man. I think that the least that he was entitled to was to get a hearing, not now -- this is late at this stage. He should have had a hearing before termination, where we could have our proof and come in. Because as is, I don't know what I am in a vacuum and so is this young fellow. I still don't know what he has been dismissed for.

In my interrogatories, they have indicated, in response, that we are not entitled to it. They have said so. "You are not entitled to it, because he doesn't have tenure," even though he has been working there for almost three years.

That, in short, is our case, Judge.

MR. HERZOG: I will be very brief, your Honor.

We agree that if there is stigma there must be some relief that the Court can give.

However, the question of whether or not he is entitled to a hearing and whether or not he is entitled to know the nature of the reason has already been decided by Judge Gurfein and has been denied by Judge Gurfein.

We are now up to a point where Judge Gurfein said the only issue is, if he can prove that he was stigmatized, then of course he can get some relief.

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2 However, your Honor, as Mr. Resnicoff says, the
3 mere fact that a police officer who is dismissed from the
4 force is immediately indicative of the fact that he is
5 guilty of some crime or some fraud is not true. There are
6 lots of reasons why he could have been relieved from the
7 force. It could have been for physical reasons, his health
8 conditions. It can be just for failing his examinations.
9 So this, of course, is not the stigma that Mr. Resnicoff
10 is talking about.

11 When we are talking about stigma, your Honor,
12 we are talking about the stigma as defined in Birnbaum
13 against Trussell in United States Supreme Court, in Roth
14 and Sinderman in that court. It is not just an ethereal
15 possible concept, well, the fellow was on the police force
16 and now he is not and therefore there is something wrong.

17 I mean, this is something that Mr. Resnicoff
18 reads into it, and he has no right to imply that the
19 general public is going to read into this.

20 Secondly, we hope to show, your Honor, and
21 I think we have indicated in our briefs that are already
22 in the file here, that if there is any stigma, it has
23 to be stigma that was produced or induced by the defendants
24 here and not just by the fact that these facts exist.

25 The policy of the Police Department has always

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been: We don't give any information to anybody, except through regular police channels, other police officials for police reasons.

So we have not made any publication.

Mr. Resnicoff is relying on Lombard. In Lombard the Board of Education sent out information in regard to this teacher that she was psychotic. We have not done that, and there is no proof of that here yet. And I don't believe that they will be able to prove that.

I say, your Honor, the only information that the Police Department releases is to police agencies for police purposes.

MR. RESNICOFF: I just say this in reply, Judge.

We have federal statutes which prohibit discrimination because of sex, age, religion --

THE COURT: You are out of court on Judge Gurfein's decision on that.

MR. RESNICOFF: No, I merely want to say this: If they don't give me a reason -- no, Judge Gurfein did not put us out, because he put us back in when he took the position, in denying the motion for summary judgment, and said: Based on the statements made in the reply affidavit, we go to trial. This is what he said.

1
2 THE COURT: Yes, but on a very narrow issue,
3 and that is your proof that there is a stigma. The mere
4 fact that he has dismissed doesn't prove that.

5 MR. RESNICOFF: Well, I think it would be
6 less than naive were we to assume anything else where a
7 young man is dismissed from the Police Department without
8 a reason, and they insist on the reason that they will not
9 give a reason.

10 How do we know that he is not --

11 THE COURT: This is purely speculative, Mr.
12 Resnicoff.

13 MR. RESNICOFF: It might be a violation of the
14 civil rights.

15 THE COURT: Yes. But we don't declare viola-
16 tions of civil rights by speculation.

17 MR. RESNICOFF: No, but in our complaint
18 I allege a violation of civil rights.

19 THE COURT: You allege it, you must now prove
20 it, and that is the purpose of this hearing. Right?

21 MR. RESNICOFF: All right.

22 MR. HERZOG: In that respect, your Honor, this
23 Court has already ruled on that in both Russell against
24 Hodges and Mancino.

25 THE COURT: All right.

1 wce Velger - direct 8

2 E L L I O T T H. V E L G E R, called as a
3 witness in his own behalf, having been first duly
4 sworn by the Clerk of the Court, testified as
5 follows:

6 DIRECT EXAMINATION

7 BY MR. RESNICOFF:

8 Q Mr. Velger, how old are you?

9 A I am 23 years old, sir.

10 Q When and where were you born?

11 A I was born August 8, 1951, at Park East Hospital
12 in Manhattan.

13 Q Are you single or married?

14 A I am single, sir.

15 Q With whom do you live?

16 A I reside with my parents.

17 Q Did there come a time when you took an examina-
18 tion for patrolman, police trainee and patrolman?

19 A Yes, sir.

20 Q I show you Civil Service announcement
21 number 8046 --

22 THE COURT: Mr. Resnicoff, is there any problem
23 about that?

24 MR. HERZOG: We concede all that.

25 THE COURT: You concede all that. I have all t

1 wce Velger - direct 9

2 background.

3 MR. RESNICOFF: Very well. I withdraw that,
4 Judge.

5 Q You passed this examination and you were then
6 appointed to what position?

7 A I was appointed to the position of police
8 trainee.

9 Q When was that?

10 A January 30, 1970.

11 Q This is in the Police Department?

12 A Yes, sir.

13 Q How long did you serve in that capacity?

14 A I served as a police trainee from January 30,
15 1970, until August 15, 1972.

16 Q Were you required to serve a probationary
17 period as a trainee?

18 A As a police trainee, no, sir.

19 Q When did you become of age, 21 years of age?

20 A August 8, 1972.

21 Q Did there come a time when you were appointed
22 a patrolman on probation?

23 A Yes, sir.

24 Q When was that?

25 A August 15, 1972.

1 wce Velger - direct 10

2 Q How much later that you became 21?

3 A It was about 7 days after I reached the age of
4 21.

5 Q As a patrolman on probation, were you required
6 to serve a probationary period?

7 A Yes, sir. The Department stated I would
8 serve a probationary period of one year.

9 Q And that probationary period would expire
10 when?

11 A August 15, 1973.

12 Q Did there come a time when you were terminated?

13 A Yes, sir.

14 Q Did you receive any charges?

15 A No, sir.

16 Q Did you receive a hearing?

17 A No, sir.

18 Q And when were you terminated?

19 A February 16, 1973.

20 MR. RESNICOFF: I believe, if your Honor
21 please, annexed to the complaint is the letter of termina-
22 tion about unsatisfactory service. I won't go into that.

23 THE COURT: I think they will concede it.

24 MR. HERZOG: We will concede it.

25 THE COURT: Yes.

1 Q Tell us what efforts you made after you were
2 dismissed from this position -- I withdraw that.

3 And you were terminated, you say, when?
4

5 A February 16, 1973.

6 Q How many more months did you have to go before
7 your probationary period expired?

8 A About five.

9 Q Tell us what efforts you made, first in
10 Government, Civil Service-wise, to obtain employment?

11 What did you do? Please elaborate.

12 A Well, after I was dismissed from the Department,
13 as to Civil Service jobs, I picked up Civil Service
14 announcements from New York City; I picked up the Civil
15 Service Weekly, the Chief, and I applied for as many Civil
16 Service exams as I was eligible to take.

17 And I competed in these exams by taking various
18 tests.

19 Q In the applications which you filed for these
20 various Civil Service tests, did you indicate the fact that
21 you had been dismissed from the Police Department?

22 A Yes, sir.

23 Q Had you been notified whether or not you
24 passed these examinations?

25 A Yes, sir.

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Q Did you pass these examinations?

A About 97 percent of the exams I took I passed.

Q Have you ever been called for any of these examinations?

A Yes, sir.

Q Tell us what happened.

A Well, I was called for one exam by the Executive Protective Service. I filled out various forms--

MR. HERZOG: Is that a Civil Service?

THE WITNESS: Yes. It is a Government position.

MR. HERZOG: What Government?

THE WITNESS: United States. And I never heard from them again.

I successfully passed the United States Post Office exam. I was called down for hiring last Christmas. I filled out various forms that they required during the interview. And I was told they'd let me know about hiring. I never heard from them again.

Q Did you indicate termination from the Police Department?

A Yes, sir, I did.

Q In any of these forms that you filled out, did they ask you to indicate the reasons why you were terminate?

A Yes.

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Velger - direct

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Q And what reason did you give, do you recall?

A Yes. I wrote that I had failed the final physical examination at the Police Academy.

I also was called by the Plainfield, New Jersey, Police Department.

And I was called down there for a preappointment interview. And I also filled out a personal history questionnaire. And I was told the hiring date would be in three weeks if the investigation was successfully completed.

I was never called down for hiring.

Q Do they constitute all or most of the Civil Service applications that you filed?

A No, sir.

Q What else did you file for? State and let us have the rest of the Government jobs.

A Well, for the United States Government I filed for Park Police, Border Patrol Agent.

Q These are all examinations?

A Yes, they are. They are competitive, open, competitive examinations.

Q And you passed these examinations?

A Yes, sir.

Q Most of them were written examinations?

1 A All of them were written examinations.

2 At the New York State level I applied for
3 New York State Trooper, Suffolk County Police Officer
4 and Yonkers Police Officer.
5

6 I also applied out of State for an open
7 competitive examination. In New Jersey I applied for
8 East Orange, Plainfield and Jersey City. The East Orange
9 exam was called off. I successfully passed Plainfield
10 and Jersey City.

11 On the New York City level, oh, I have taken
12 Triborough Bridge and Tunnel Authority Officer, Sanitation
13 Man, Corrections Officer, Transit Authority Railroad
14 Clerk.

15 Q Did you pass these examinations?

16 A Yes, sir. Many of them with high marks.

17 Q Did you indicate in your application that you
18 had been terminated from the Police Department?

19 A Yes, sir.

20 Q Incidentally, did you ever apply for the
21 Metropolitan Police in Washington, D. C.?

22 A Yes, sir, I did.

23 I forgot about that one.

24 Q Did you take the examination there?

25 A Yes, I did.

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Velger - direct

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Q Did you pass it?

A Yes.

Q Did you indicate termination from the Police Department?

A Yes, sir, I did.

Q Were you ever called?

A No, sir.

Q Now, let's go into the private sector. Where did you apply for jobs there?

A Well, what I did is, I would look up in the newspaper job availability positions, and I at first tried to get jobs in the security field. I applied for a job with the American Bank Note Company, as a security guard in the South Bronx. I was called in for an interview, and the man had made several remarks about my records.

At that time the Knapp Commission hearings had just ended and he tried to infer that I had been terminated from --

MR. HERZOG: Objection.

THE COURT: Sustained.

Q Just tell us what he said, not what he inferred.

A Okay.

The man said that they had no --

MR. HERZOG: I object to what he said.

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Velger - direct

16

2 THE COURT: He is objecting to it.

3 MR. RESNICOFF: I thought he was objecting
4 to the inference, not to the conversation.5 THE COURT: He is objecting on the ground of
6 hearsay.

7 Q Did you get the position?

8 A No, sir.

9 Q Where else did you apply?

10 A I applied to various banks near where I live,
11 and some of them downtown here in Manhattan. I would go
12 and see the bank manager. Some of them gave me a little
13 questionnaire to fill out, and I filled it out. I never
14 heard from any of these banks I went into.15 Q Did you indicate that you had held a prior job
16 with the Police Department and you had been terminated?

17 A Yes, sir, I did.

18 Q What other private industry agencies did you
19 apply for and where did you get a job, if any?20 A I went to Bonwit Teller. They had an opening
21 for a store detective. I was interviewed. And they told
22 me they'd call me. They never did. I went to E. J.
23 Korvettes to apply for a security position there, in
24 Scarsdale. I also filled out a questionnaire. I never
25 heard from them.

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Velger - direct

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Then I decided to look elsewhere than the security field. I applied for a job as a bathroom fixture painter. I was turned down for that. I applied for a job as a sound editor, as I had had previous experience in high school in audio visual aids. I was turned down for that job. I applied for a job distributing books in the Bronx area to various businesses. I never heard from that position again.

Any available opening that they had in the want ad section that I thought I could fit into or that looked like a decent job, I tried to apply for.

Q Did there come a time when you applied for a job with Penn Central?

A Yes, sir.

Q Penn Central Railroad?

A Yes, sir.

Q Tell us about it.

A I had heard that the Penn Central Railroad police hire -- well, the Penn Central Railroad hires men to be police officers to guard their holdings and property.

And I went down there, and their process is that you put your name down, it's accepted and put on a waiting list, and when they get to your name they call you down and give you a test. I put my name on the list about

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Velger - direct

18

March or April of '73, and in August of 1973 I was called down to the Penn Central Police Headquarters in Penn Station and given a battery of competitive intelligence tests.

And out of the 20 people that took the exams, I scored fourth highest in the class, and we were told they would hire five people out of that group.

So I was among the five that was hired on September 10th, 1973.

Q What kind of work did you do there when you were hired with Penn Central Railroad?

A When I was hired I was sent to the Weehawken Yards, in Weehawken, New Jersey, and I performed preventive patrol there. We checked various cars laden with high-value goods, like television sets, loads of liquor, loads of meat that would come in.

We checked on the trains that passed through the various towns in New Jersey to make sure there was no pilferage and theft. We sealed various cargos with railroad seals. We checked on any emergency condition such as reports of debris lying on the track, children playing on the railroad tracks, and we attempted to keep trespassers off of railroad property.

Q Did there come a time when your employment

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Velger - direct

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was terminated?

A Yes, sir.

Q When was that and tell us the circumstances.

A That was November 11, 1973. About November 3, 1973, I was performing a 4 to 12 in the South Kearney Truck Train Yard in New Jersey. I had been transferred there after Weehawken. And I was told that a Lieutenant Hamilton wanted to see me in the headquarters.

And when I got to the Penn Central Headquarters in Penn Station, about 1 o'clock at night, there was a letter that was left there for me, and the desk officer there told me I should affix my signature to the letter, that they needed it to continue my character and background investigation.

The letter stated -- I don't remember the exact wording -- it stated something like: I, Elliott H. Velger, do release my records to the Penn Central Railroad Police, an authorized agent of the Department, and that I don't hold the railroad police or the New York City Police in any liability in any way, and of course I signed it because I was requested to. That was November 2 or 3.

November 11 I was called up -- I was scheduled to do a 4 to 12 that day, I was called up by one of the

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Velger - direct

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officers there at my residence, about 9 or 12 in the morning, and he told me to bring all my available equipment with me down to headquarters: Shield, identification card, handcuffs, tyden ball seals, any railroad equipment that had been issued to me.

I appeared that morning around 11 o'clock and I spoke to a Captain Steele. And he explained to me that my records in the Police Department --

MR. HERZOG: Objection.

THE COURT: Sustained.

Q Were you retained?

A No, sir. They told me I was going to be terminated.

Q Did they tell you why you were being terminated?

MR. HERZOG: Objection.

THE COURT: Sustained.

MR. RESNICOFF: I did want at this point to make an offer of proof, he knows why they told him he was terminated, Judge.

It is rather important.

THE COURT: It is hearsay.

Q Incidentally, how much were you earning at the time of your dismissal from the Police Department?

A The New York City Police?

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Velger - direct

21

1
2 Q Yes.

3 A 11,200 per annum.

4 Q So that you were working for the Penn Central
5 for how long a period of time?

6 A A little over two months.

7 Q Was there any question about the quality of the
8 work that you were performing while as a guard at Penn
9 Central?

10 A Not in the least, sir. I was told that my
11 work was excellent.

12 Q Did you attempt to get a gun or was it necessary
13 for you to get a gun?

14 A If I had successfully passed my probationary
15 period in the Penn Central Railroad Police, I would have
16 been issued a revolver.

17 Q What are you doing now?

18 A I am now a police administrative aide. It is a
19 clerical position with the New York City Police Department.

20 Q What does that job pay?

21 A It pays 8200 per annum.

22 Q And this is as a result of an examination?

23 A Yes, sir.

24 Q You are now serving a probationary period?

25 A Yes, sir.

1 Q Did you have a conversation with your sergeant
2 the other day with respect to termination of your employ-
3 ment --
4

5 A Yes, sir, I did.

6 Q --as a police administrative aide?

7 A Yes, sir, I did.

8 Q And where is this, right at police headquarters
9 across the street?

10 A No, sir, this was at the Applicant Investi-
11 gation Section at Old Slip and South Street.

12 Q Tell us what the sergeant said to you and what
13 you said to him?

14 MR. HERZOG: Objection.

15 THE COURT: I am going to sustain the objec-
16 tion.

17 MR. RESNICOFF: This is a sergeant of the Police
18 Department.

19 THE COURT: Let's produce him.

20 MR. RESNICOFF: I don't even know who he is.
21 He is going to terminate him because of what happened.

22 MR. HERZOG: I object. Are you testifying, Mr.
23 Resnicoff?

24 MR. RESNICOFF: No.

25 THE COURT: You are testifying.

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Velger - direct

23

Q When does this probationary period terminate?

A January 17, 1975.

Q Have you been told that your services are going to be terminated?

A Yes, sir.

MR. HERZOG: Objection.

THE COURT: Sustained.

The answer may be struck.

MR. RESNICOFF: I have no further questions.

CROSS EXAMINATION

BY MR. HERZOG:

Q Mr. Velger -- is that it?

A Yes, sir.

Q Now, all these Civil Service exams you took with the Federal Service, State of New York, you are still on those eligible lists?

A Quite a few, yes, sir.

Q And have you ever been told you are ineligible?

A Have I ever been told?

Q Have you ever received any notice of ineligibility?

A Yes, sir.

Q From which agencies and which departments?

A The Taxi and Limousine Commission, I believe.

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Q Did they give you a reason why you were ineligible?

A No, sir.

Q As regards the Penn Central, I understand you testified that you had consented to them conducting an investigation and asking the Police Department for your record, is that true?

A Yes, sir, it is required.

Q In other words you signed an authorization?

A Yes, sir.

Q And without that authorization they couldn't have gotten that record?

A Yes, sir.

Q Just one other question: With regard to the City of Plainfield, you testified that you applied for a job as a police officer for the City of Plainfield?

A Yes, sir.

Q And you didn't get that appointment?

A No, sir.

Q Did you ever sign an authorization for the Police Department of the City of Plainfield to get a background check or to approve a background check?

A Not for the New York City Police Department. I did for my previous positions.

1 Q But you refused to do it for the New York
2
3 City Police Department?

4 A Yes, sir, I did.

5 Q Were you told by the City of Plainfield that
6 you couldn't get it until they obtained a background
7 check?

8 A No, sir.

9 MR. HERZOG: Can I speak to Mr. Resnicoff for
10 just one moment, your Honor?

11 THE COURT: Yes.

12 MR. HERZOG: Would you consent to putting this
13 in or do I call the person from --

14 (Discussion between Mr. Resnicoff and
15 Mr. Herzog.)

16 MR. RESNICOFF: Can we approach the bench,
17 Judge?

18 THE COURT: Yes.

19 MR. RESNICOFF: Off the record.

20 (Discussion off the record.)

21 MR. HERZOG: I offer this in evidence.

22 MR. RESNICOFF: I object to it.

23 A May I address the Court?

24 THE COURT: No, you may not.

25 MR. RESNICOFF: Objection, if your Honor please.

Oh, Just one thing.

A As far as I know, sir, yes.

A No, they didn't tell me why.

A No.

A I got an application in the mail that my
cation was ineligible.

A I don't have it with me, sir.

Q It was a punch card, it was an IBM punch card.

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Velger - cross

27

Q An ineligibility you got by punch card?

A Yes, sir.

Q Are you sure?

MR. RESNICOFF: Not every commission works the same way, Irwin.

MR. HERZOG: It is the same Civil Service Commission.

Eligibility is passed on by the Civil Service Commission.

A I received a punch card in the mail from the Taxi Limousine Commission. They just -- I am not sure what it was. A lot of the exams I applied for, some of my qualifications didn't fit. I took every exam that was possible. It's possible I didn't have the qualification for the position. They just sent me a punch card stating I was ineligible.

Q Did you ever get a letter from the New York City Civil Service Commission or the New York City Department of Personnel which had a lot of boxes on it where there is check off one block, ineligible for A, B, C, D, E, giving your reasons?

A No, sir, I have taken over a hundred Civil Service exams. I have so many notices. I really don't remember. I received a punch card from them.

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Velger - cross

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Q Did you ever receive any notice of ineligibility from any exam of the type I explained to you?

A No.

MR. HERZOG: Thank you.

(Witness excused.)

MR. RESNICOFF: Captain Steele.

xx R O B E R T J. S T E E L E, called as a witness

by the plaintiff, having been first duly sworn by

the Clerk of the Court, testified as follows:

xx DIRECT EXAMINATION

BY MR. RESNICOFF:

Q Captain Steele, you and I met for the first time, is that correct?

A That's correct.

Q You are under subpoena?

A Yes.

Q Other than the one telephone conversation that we had, we have never met, is that right?

A That's correct.

Q Do you know the plaintiff, Mr. Velger here?

A Yes, I do.

Q Will you tell us the circumstances, how you got to know him?

A Well, after his appointment --

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Steele - direct

29

Q Excuse me. I will withdraw that.

Where are you presently employed?

A Captain of Police, Commanding Officer at
Pennsylvania Station, New York, Penn Central Railroad
Station Police.

Q How long have you been there?

A At Penn Station?

Q Yes.

A Four years.

Q Now, my previous question: How did you meet
him? How do you know him, Mr. Velger?

A I met him as an applicant at Pennsylvania
Station here.

Q Was he appointed?

A Probationary status, yes.

Q What kind of work did he do?

A To my knowledge, all good work.

Q Did there come a time when he was terminated?

A Yes.

Q Do you know why he was terminated?

A Yes, I do.

Q Will you please tell his Honor why?

A I was forced by my superior --

MR. HERZOG: I object.

- 1 wce Steele - direct 30
- 2 THE COURT: Sustained.
- 3 Q Do you know of your own knowledge why?
- 4 A Yes, I do.
- 5 Q All right, please tell us.
- 6 A As a result of the investigation of his
- 7 background conducted by then lieutenant, now Captain Hamilton
- 8 Ronny E. Hamilton, that his background investigation with
- 9 the New York City Police Department wasn't satisfactory
- 10 due to an incident that had occurred while he was in the
- 11 New York City Police Department.
- 12 Q Do you know what that incident was?
- 13 A Yes, I do.
- 14 Q What was the incident?
- 15 A It involved a revolver.
- 16 Q Do you know any further details or you know
- 17 nothing else about that?
- 18 A Very sketchy, that he had put a revolver to his
- 19 head.
- 20 Q Did they indicate this was with a group of
- 21 other fellows, horse play or anything like that? Do you
- 22 know anything about that?
- 23 A I understand there were others present.
- 24 Q It was what? I am sorry.
- 25 A There were others present at the time.

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Steele - direct

31

Q There were others present?

A Yes.

Q This was in the Academy, do you recall?

A Yes.

Q Was that the only reason why he was terminated?

A Yes.

Q And that was the cause of his termination from the New York City Police Department?

A Yes.

Q You say other than that his work with Penn Central was quite satisfactory?

A All his personnel evaluation reports were good.

MR. RESNICOFF: You may examine.

MR. HERZOG: I have no -- just one question.

CROSS EXAMINATION

BY MR. HERZOG:

Q Captain Steele -- is it?

A Yes.

Q --when you obtained the information from the New York City Police Department, Mr. Velger had authorized that in order for you to obtain that information, is that not true?

A I did not obtain it.

1 wce Steele - redirect 32

2 MR. HERZOG: I have no questions.

3 REDIRECT EXAMINATION

4 BY MR. RESNICOFF:

5 Q But do you know whether Mr. Velger had signed
6 such a form? Such a form is in existence, isn't that
7 right?

8 A Yes.

9 MR. RESNICOFF: All right. That is all.

10 Thank you Captain.

11 (Witness excused.)

12 L O N N I E H A M I L T O N, called as a witness
13 by the plaintiff, having been first duly sworn by
14 the Clerk of the Court, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. RESNICOFF:

17 Q Where are you presently employed, sir?

18 A I am presently employed with the Penn Central
19 Railroad Police as night captain, New York and New Jersey.

20 Q We meet for the first time?

21 A Yes, sir.

22 Q Did we ever have a telephone conversation
23 before?

24 A No, sir.

25 Q You are here under subpoena, is that correct?

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Hamilton -direct

33

A That's correct, sir

Q You have never seen me before?

A No, sir.

Q All right. How long have you been with the
Penn Central?

A Ten years, sir.

Q Where a man makes an application for employment with Penn Central, particularly where he has been employed as a policeman or fireman of the City of New York, does he fill out a form releasing records, authorizing Penn Station to get his records from the Police Department or from the Fire Department?

A Yes, sir. I require that.

Q Was such a form filled out by Mr. Velger as the applicant?

A I drew up a letter and had him sign it, yes, sir.

Q Which authorized Penn Station to get the forms, is that correct, or to get the records from the Police Department?

A Right, sir.

Q And he signed such a form?

A Yes, sir.

Q Now, first with respect to the quality of his

- 1 wce Hamilton - direct 34
- 2 work, working for Penn Central, was it satisfactory?
- 3 A So far as I know it was very good.
- 4 Q Thank you.
- 5 Now, did you receive any reports or did you
- 6 contact the New York City Police Department where Mr.
- 7 Velger had previously been employed and terminated?
- 8 A Yes, sir.
- 9 Q Tell us what you found out?
- 10 A Well, I first attempted to contact the New
- 11 York City Police Department by letter, and I received a
- 12 return letter from a Lieutenant Dcwd in the personnel
- 13 department stating --
- 14 Q Excuse me. Dcwd? How do you spell that?
- 15 A D-o-w-d.
- 16 Q Thank you.
- 17 A Stating across the face of the letter, "He
- 18 worked here until he left."
- 19 I then went and visited the New York City
- 20 Personnel Department, over here in the new police head-
- 21 quarters, and I was advised that I could not see his
- 22 service record unless he authorized me to do so.
- 23 I then went back to the office, typed up a letter
- 24 of authorization, and left it for Patrolman Velger to
- 25 sign.

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Hamilton - direct

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Q Did he sign it?

A Yes, sir.

Q Then what did you do with it?

A Two days later I went back to police headquarters and delivered it to the sergeant on duty at the office, and looked through his personnel record.

Q You looked through the records?

A Yes, sir.

Q Tell us what was the reason for the dismissal from the Police Department?

A From the New York City Police Department?

Q Yes.

A It occurred in the Police Academy, Velger was on probation with the New York City Police Department. It was involving approximately four or five individuals.

Q Other patrolmen?

A Other patrolmen. And supposedly one of the officers reported that Patrolman Velger --

MR. HERZOG: Excuse me. Is this what he said or is this what was in the records?

MR. RESNICOFF: What was in the records.

A This is what was in the records, sir.

MR. HERZOG: In the records, all right.

A That patrolman Velger had stuck a service

1
2 revolver to his head in an apparent attempt to commit
3 suicide.

4 Q Did they permit you to make copies of the
5 reports or that was not permitted?

6 A I did not make copies of the reports. I took
7 notes from the file.

8 Q Then you came back and reported that to your
9 superiors or whoever it was?

10 A No, sir. I then tried to verify it.

11 Q You did not try to verify it?

12 A I tried to verify the information in his
13 service file.

14 Q And what happened?

15 A I drew a negative attitude from the New York
16 City Police Department. They advised me to go about it
17 by letter. I explained to them that I had already
18 attempted to do it by letter, and I gave up.

19 Q As a police officer were you satisfied with
20 that report?

21 A No, sir.

22 Q They wouldn't permit you to investigate or talk
23 to these other policemen that were involved there, the
24 other probationary patrolmen, is that correct?

25 A No, they wouldn't permit it. I just drew a

1 wce Hamilton - direct 37

2 blank attitude from the New York City Police Department.
3 I decided that I could never prove or disprove exactly
4 what happened, so I let it go as it stood.

5 Q Then what happened after that, when you came
6 back to your headquarters?

7 A After that? I returned to my boss and advised
8 him of my findings, and I told him that under the circum-
9 stances I would recommend that Patrolman Velger be
10 terminated.

11 Q And he was terminated?

12 A Yes, sir.

13 MR. RESNICOFF: You may examine.

14 CROSS EXAMINATION

15 BY MR. HERZOG:

16 Q Now, the information you obtained from the
17 Police Department, Lieutenant, was obtained purely by your
18 examination of the records?

19 A That's correct, sir.

20 Q And nobody in the Police Department told you
21 anything?

22 A No, sir.

23 Q In fact when you asked the Police Department
24 to help you they didn't want to help you at all, they
25 didn't tell you anything?

1 wce Hamilton - cross 38

2 A No, sir.

3 Q They didn't give you any information?

4 A No, sir.

5 MR. HERZOG: Thank you, that's all.

6 MR. RESNICOFF: No further questions.

7 THE COURT: You are excused.

8 (Witness excused.)

9 MR. RESNICOFF: I have nothing further,
10 if your Honor please.

11 MR. HERZOG: If your Honor please, I move to
12 dismiss the complaint at the end of the plaintiff's case.
13 I think the evidence this morning is clear that if anything
14 happened at all, it is clear the Police Department didn't
15 give out any information about this person. Whatever infor-
16 mation came to the Penn Central they obtained themselves
17 under his authorization. As Lieutenant Hamilton just
18 testified, the Police Department didn't tell him anything;
19 they didn't give him anything. They took the complete
20 clam-up attitude. They said, "No, we can't give you this
21 information," and he was quite upset by not getting this
22 information.

23 Now, Mr. Resnicoff is trying to make out a
24 case that there is a question of stigma here. If there is
25 any stigma, your Honor, it couldn't have come from the

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Hamilton - cross

39

defendants here. I respectfully move to dismiss the complaint.

MR. RESNICOFF: If your Honor please, I am really --

MR. HERZOG: Besides I don't think he has made out a case of stigma. Mr. Velger testified he was never declared ineligible from any exam, he is still on eligible lists. The reasons that he was turned down from other employment he didn't know except that he may have not been qualified for other reasons. I have heard no testimony to show that he was stigmatized.

THE COURT: Mr. Resnicoff?

MR. RESNICOFF: If your Honor please, I am really surprised at the basis for the application made by Mr. Herzog, whom I have known for many years. While it may be, and I don't know, that the Police Department actually didn't send the information to Captain Hamilton, but they made it available and he saw it. But what's more important is the existence of such a report, which in and of itself is a stigma. They speak about five probationary people, with a gun, pointing a gun. That is a stigma, a serious stigma. And if they claim -- and I still don't know what the claim is -- if they claim that he is mentally irresponsible or suicidal, I don't know, or

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Hamilton - cross

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1 homicidal, as Judge Gurfein points out -- and I am reading
2 now from the Lombard case -- "A charge of mental illness
3 purportedly supported by a finding of an administrative
4 body is a heavy burden for a young person to carry through
5 life. A serious constitutional question arises if he has
6 had no opportunity to meet the charge by confrontation in
7 an adversary proceeding."
8

9 Now, it may very well be that this whole inci-
10 dent was blown out of proportion. You got five rookie
11 cops in the Academy involved in a little horse-play. He
12 has been on the force three years. And they have got this
13 in the file. This young man, if that isn't a stigma, then
14 I don't know what it is.

15 This is the crux of this case: That they have
16 got it in their records, and he has never been given a
17 chance to contradict or to rebut or even to know what they
18 have got against him. That is a violation of his consti-
19 tutional rights and that is a denial of due process and the
20 equal protection of laws. That is what this case is
21 about and that is what the Lombard case is and that is Perry
22 against Roth -- I mean, Boston College against Roth and
23 ~~Roth~~ and Sinderman cases. That is why this Court has
24 jurisdiction. He is a young man, but he has constitutional
25 rights. He has a life to live. And he can't go through

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2 life with this stigma.

3 Under those circumstances, I say, when your
4 Honor reserves decision, to think about those things.
5 That is what we are talking about in this case, a young
6 man 23 years of age, and they got something in there. If
7 they show it to him, anybody comes in that takes a look at
8 the Police Department, got a paper. That is why he didn't
9 want to sign it for Plainfield. He wasn't getting any-
10 where. They came in, take a look, they have an incident
11 about a gun. Who is going to hire him. He is dangerous.
12 I don't know whether he is a criminal or he is sick. But
13 to put that label on him the rest of his life and
14 that I don't think is fair and that I think is a violation
15 of his constitutional rights.

16 And therefore, he should be reinstated and
17 he should be given a full hearing, an adversary hearing.

18 Let's see what happened, which is the only fair thing
19 to do. Thank you, if your Honor please.

20 MR. HERZOG: If your Honor please, I think
21 what Mr. Resnicoff is trying to say almost sounds ludi-
22 crous to me. He is trying to tell us that the Police
23 Department doesn't have a right to investigate its own
24 candidates and make a decision, unless he is given a hear-
25 ing.

1 wce
2 We have been past this question of a hearing,
3 we have had that already and that has been decided. The
4 question here is the question of stigma. So the question
5 is that we have a right. I think it is unquestioned that
6 every agency has a right to investigate the background of
7 its employees who it is hiring, at the time it hires or
8 shortly thereafter during a probationary period and to make
9 a record.

10 Now he is saying this is a stigma because it is
11 on the record. But did you see, your Honor, what the
12 testimony was in order to get this record? They couldn't--
13 nobody could get the record except with this man's own
14 authorization.

15 So certainly if there is any stigma, we don't
16 stigmatize anybody. We kept this, this is our record
17 for our business. And unless he wanted us to give it to
18 anybody, it wouldn't have gone to anybody. And this is
19 the testimony before you, your Honor.

20 MR. RESNICOFF: Judge, if your Honor please,
21 let me just say this, in conclusion: You may have seen the
22 Law Journal of this week. It was a very fine decision by
23 Mr. Justice Arnold Fein, in the State Supreme Court,
24 New York County, I think it was in Wednesday or Thursday's
25 Law Journal.

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2 In that case -- I believe I may have a note of
3 it here -- in that case Judge Fein, after reviewing the
4 authorities, the Constantino case in the Supreme Court
5 of the United States, Boddie against Connecticut, Roth
6 case, the Boston College case, and the Sinderman cases,
7 the Lombard case, he held, and this is new law and this is
8 going further -- he held that a provisional employee, a
9 provisional employee -- the decision as I say is in the
10 Law Journal -- here is a man who never took an examination,
11 he is appointed off the street, could be a political hack,
12 appointed to a job, and Judge Fein held that it was a
13 violation of his constitutional rights to dismiss him
14 without giving him a hearing. He didn't indicate what
15 kind of a hearing, but he said he could not be summarily
16 dismissed without a hearing.

17 Of course, they will say, "Well, we are going
18 to appeal." Of course, when they say Corporation Counsel--

19 MR. HERZOG: I didn't say that at all.

20 MR. RESNICK: If Corporation Counsel said, "We are
21 going to appeal," the Judge is supposed to genuflect, they
22 are going to appeal. He has gone very far. It is a
23 different ball game today. They are speaking of individual's
24 constitutional rights.

25 Now, certainly this man -- and I am not prepared

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2 to say that it is -- he has been with this department for
3 three years. And when you terminate a man, a patrolman
4 on a charge of that kind, good God, in all fairness serve
5 him with charges, give him a chance to defend, let's
6 see what happened. Maybe it was just a little horse play
7 with a couple of guys who were just about ready to graduate
8 from the Academy, go out on the street. They were kidding
9 around. Whatever the situation was. We don't know. But to
10 say we don't release -- maybe they don't release it, but if
11 anybody comes in and signed by him and they got that, who is
12 going to hire him. And that is what I say, and I am
13 repeating myself, which I don't want to, he doesn't want to
14 sign the other one because if he does he is a dead duck.
15 Who is going to hire him.

16 He has signed applications for transit police,
17 housing all these other places. He signed releases. They
18 get in touch with New York City Police Department, they send
19 one of their investigators down. They look at this,
20 they come back, there is an incident with a gun, that's it.
21 He is finished.

22 Under those circumstances, I say, if your
23 Honor please, in chambers, when you think about this case,
24 please think of it in the form of constitutional rights
25 which are involved in this case for this man, whether

1 wce

2 it is fair to require him to go through the rest of his
3 life with that kind of stigma. And that is a stigma.

4 Thank you, Judge.

5 THE COURT: I will listen once more.

6 MR. HERZOG: Once more. If your Honor please,
7 in regard to the case that Mr. Resnicoff was speaking
8 about, that was cited by Judge Fein, I am familiar with the
9 case. In fact, my recommendation was that we don't
10 appeal it, so I hope you are not disappointed. In that
11 case the man was fired because there was an allegation in
12 the public press that he was fired because he was a thief.
13 In the public press. The newspaper had evidently slipped
14 out through the agency that they fired the guy because he
15 had stolen or something. It is very different from this
16 case. There was no publication to anyone whomsoever
17 except on this one occasion at his own -- on his authoriza-
18 tion.

19 We believe this is very different than the case
20 that was decided by Judge Fein. There it was an obvious
21 case. We think it was properly decided. There was a
22 stigma attached. It was in the public papers, newspapers,
23 the press. This is not the fact here at all.

24 THE COURT: I tell you what. I am going to
25 reserve. I will take a short recess. Then I am going to

1 wce

2 let you go forward with your proof.

3 MR. HERZOG: If your Honor please, I have
4 to get, if we are going to go forward, I have to get some-
5 body from Plainfield, whom I don't have on hand now, and I
6 have to get one other witness from the New York City Police
7 Department. The Police Department witness I have on tele-
8 phone call to be here shortly.

9 THE COURT: Let's get the Police Department
10 witness. If you have got that letter of authorization
11 out of the file, I am sure that Mr. Resnicoff will agree
12 to let that go in. Let me know when you get your witness.

13 MR. HERZOG: Yes.

14 THE COURT: I am talking about the letter of
15 authorization to look at this file. Have you got that?

16 MR. HERZOG: Ask him. We will get it. I think
17 he has admitted the letter. I think we have it. I assume
18 we have it.

19 THE COURT: I would like to see what the language
20 of it is.

21 Court will take a short recess.

22 (Recess.)

23 MR. HERZOG: I call Mr. O'Brien.
24
25

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O'Brien - direct

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THOMAS P. O'BRIEN, called as a witness by the defendants, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. HERZOG:

Q Mr. O'Brien, what's your occupation?

A I am administrative manager with the New York City Police Department, at present assigned to the Personnel Records Division.

Q What are the duties of that, what duties do you perform?

A We control the Department personnel records of the entire department, both service and civilian personnel.

Q How long have you been serving in that position?

A At this present area I have been there about six, seven weeks.

Q Where were you before that?

A Before that I was in charge of the probationary personnel record area.

Q Which is very much related to what you are doing now?

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A Right.

Q In regard to probationary records, how long were you in that area, how long have you been in that?

A Seven months.

Q No, the prior job.

A At the personnel probationary?

Q Yes.

A I was there for seven months.

Q And before that?

A I was administrator of the Police Academy for six years -- five years, and a year as an assistant administrator.

Q In regard to records of probationary patrolmen that are terminated, does Police Department have any policy in regard to sending out information as to reasons for termination?

MR. RESNICOFF: I object to that. Policy doesn't rise to level of law.

Q What does the police department do with regard to request for information as to termination?

A The request for information as to reason for termination is never given out.

Q To anybody?

A Other than policy agencies. It has to be a

wce

O'Brien - direct

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Governmental agency like Park Police, Government Police.

If they are investigating for background, they are advised to appear at the area and we will give them such information as we consider necessary for them to make a determination.

Q Do they have to have an authorization to obtain that information?

A Not if it is a Government police agency.

Q How about if it is a non-Government police agency?

A The information is not given to them.

Q Not given to anyone.

A That's right.

Q I asked you to look for an authorization in regard to Elliott Velger.

Did you do that before you came here?

A Yes, we checked before we came. It was not in the file in the office. But separated personnel for the period '73, I believe is the date involved, have been transferred to the old record room at 325 Hudson Street.

Q How long will it take to make that available to this Court?

A It would probably require a search of the record over there. Probably could not be done before

1 wce O'Brien - direct 50

2 tomorrow.

3 MR. HERZOG: Thank you. I have no further
4 questions.

5 MR. RESNICOFF: May I have just one moment,
6 Judge, please.

7 CROSS EXAMINATION

8 BY MR. RESNICOFF:

9 Q Mr. O'Brien, just a few questions. Mr. O'Brien,
10 what's your Civil Service title.

11 A Administrative manager.

12 Q That's your civil service title?

13 A It is, sir.

14 Q And you say you work in the unit that takes
15 care of the personnel records of civilians and uniformed
16 as well?

17 A Yes, sir.

18 Q You looked at the records for Mr. Velger,
19 is that correct?

20 A No, I did not. They are not in my custody
21 at present. They are in the old records room at 325 Hudson
22 Street.

23 Q I see. So you are not familiar with his
24 records at all?

25 A I am not familiar with any records.

1
2 Q All right. So you were here just to offer some
3 testimony on so-called policy, is that right?

4 A What the department procedure is.

5 Q Department procedure. You said something
6 about Government agencies, if they send or request informa-
7 tion, you send it along, is that correct?

8 A We do not send the information to them. They
9 must come to the area, to the office.

10 Q In other words, if a man, for example, takes
11 an examination for New York City Transit Patrolman, and
12 he is working as an administrative aide in New York City
13 Police Department, and he indicates employment with the
14 Police Department, and if the New York Transit Police
15 Department requests information as to his records, they
16 don't release information by correspondence, they have to
17 come over to take a look at it?

18 A Normally, yes.

19 Q And that is true for Civil Service Commission,
20 too?

21 A Civil Service Commission can subpoena the
22 records, direct us to deliver the records in certain areas.

23 Q The Civil Service Commission can subpoena your
24 records?

25 A Not subpoena them. They direct us to deliver

1
2 them.

3 Q And how about other City agencies?

4 A Other city agencies?

5 Q For example, the New York City Housing
6 Police?

7 A To be perfectly frank, I haven't seen anyone
8 leave the Department for the New York City Housing
9 Police.

10 Q Mr. O'Brien, I didn't ask you that, sir.

11 A No, the procedure would be, the information
12 would be at there, and they would have to come to us and
13 get it there and not take the records from the unit.

14 Q And if I asked you the same question with
15 respect to the Fire Department, you have seen a number of
16 men transfer to Fire Department?

17 A That's right, yes.

18 Q So Fire Department has to come down to look at
19 the records?

20 A That's right.

21 Q How do you consider the Penn Central Railroad?

22 A As a private agency.

23 Q Supposing you received a letter from Penn
24 Central Railroad requesting information on a former patrol-
25 man.

1 A We would release no information except what
2
3 his title was, when he left, and what his salary was.

4 Q But their representative could come down and
5 look at the man's records?

6 A No, sir, he is not a Government agency.

7 Q Would he be able to come down and look at the
8 records?

9 A That I do not know. I don't believe the
10 records should be made available to him, according to the
11 way it is operated now.

12 Q I didn't ask you about now. I am asking you
13 about if you know what the procedure was in '73. That is
14 what we are concerned about, particularly with respect to
15 Mr. Velger. Were you aware of the fact that in '73 Mr.
16 Velger, who had been terminated as a probationary patrol-
17 man, had been appointed by the Penn Central Railroad?
18 Had you been aware of that?

19 A No, I had not.

20 Q Had you been aware of the fact that Penn
21 Central Railroad had obtained from Mr. Velger a release
22 authorizing them to inspect his records? Were you aware
23 of that?

24 A No, I was not.

25 Q Were you aware of the fact that a Captain

1
2 Hamilton of the Penn Central Railroad requested the
3 release of the information in writing and it was rejected
4 or denied by the Police Department? Are you aware of
5 that?

6 A No, I am not aware of that fact.

7 Q Are you aware of the fact that Captain Hamil-
8 ton was directed by Police Department to come down per-
9 sonally and was shown the records and read the records
10 and made copies of Mr. Velger's reports? Are you familiar
11 with that?

12 A Not at all, sir.

13 Q You know nothing about that?

14 A No.

15 MR. RESNICOFF: I have nothing further, Judge.

16 MR. HERZOG: I have no further questions.

17 THE COURT: I have a question.

18 Mr. O'Brien, in '73, were the rules the same
19 as they are today, do you know?

20 A To the best of my knowledge they were, sir.

21 THE COURT: In other words, a private agency,
22 according to your procedure, that you know about, personally,
23 would not be able to inspect the records?

24 THE WITNESS: No, sir.

25 THE COURT: You would admit, however, that it

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O'Brien - cross

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2 is done on a personal basis on occasion?

3 THE WITNESS: Well, I can't say for what had
4 happened in the past.

5 THE COURT: In other words, if I know the
6 sergeant on the desk and I am a police officer from a pri-
7 vate agency and I have a release from the person.

8 THE WITNESS: He would not have access. He
9 would have to -- in other words, those records, they
10 would have to come in either to Lieutenant Frank Dowd
11 or myself at present. And prior to filling this position,
12 Sergeant Crotone had it. And this is something that --

13 Q How long would he have it? Would he have had
14 it during this period?

15 A I believe he would, sir.

16 THE COURT: February '72 through February '73?

17 THE WITNESS: I believe if it were '72 it would
18 have been Sergeant Crotone.

19 THE COURT: I don't have any other questions,
20 but if I raised questions for you you may ask it.

21 MR. RESNICOFF: Of course, this witness hasn't
22 answered directly your Honor's question. I appreciate
23 your Honor's question. He hasn't answered the question as
24 to whether or not under those circumstances they could get
25 it.

1
2 BY MR. RESNICOFF:

3 Q Are you inferring now that under no circum-
4 stances could anybody look at records, see records, where
5 they come in with a release? Is this what you are saying?

6 A Is it possible? Anything is possible.
7 Absolutely I don't --

8 Q Were you here when Captain Steele and Captain
9 Hamilton testified with respect to having seen reports of
10 the Police Department?

11 A No, sir.

12 Q Who was in charge at that time?

13 A My predecessor was Sergeant Frank Crotone
14 in this area.

15 Q Let me just clear this up, then, in my own mind.
16 You say that if, for example, this man
17 Velger applied for the Yonkers Police Department or the
18 Suffolk Police Department or a Post Office job, how would
19 they get his records?

20 A They would be directed to come in person to our
21 area.

22 Q Oh.

23 A And identify themselves as a member --

24 Q So they could see it, no question about that?

25 A No, we would screen them. We wouldn't give

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O'Brien - cross

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2 them everything.

3 Q What would you hold back?

4 A Department hearings in reference to assign-
5 ments.

6 Q But he had no hearing, did he? Mr. Velger had
7 no hearing.

8 A Then this material wouldn't be in his file.

9 Q So that when he comes in, my question to you,
10 with respect to these Suffolk County or Yonkers Police
11 Department, they give them the records, there is no hear-
12 ing, to look at, is that correct, if he has a release
13 signed by Mr. Velger?

14 A I would not commit myself whether they would
15 give them the entire record to go through.

16 Q They give them part of the record?

17 A That's right.

18 Q Would that part of the record they would show
19 have the reason why he was terminated?

20 A No.

21 Q What would that record have?

22 A It would have what we call a PA 15, which is
23 the background investigation of the individual for appoint-
24 ment.

25 Q The PA 15, Mr. O'Brien, isn't that the appli-

1 wce O'Brien - cross 58
2 cation that the candidate himself fills out?

3 A That's right.

4 Q Which I am familiar with and which you know?

5 A That's right.

6 Q That is the application that the man fills
7 out, he fills out for a job after he takes the examination
8 and he fills it out and submits it to the Police Department?

9 A Right.

10 Q I am not talking about the PA 15. This is a
11 record prepared by the applicant himself. I am talking
12 about records of the Police Department concerning the
13 nature of his work, the character, the unsatisfactory --

14 A No, that part would not be shown to anyone.

15 Q Even to another Government agency?

16 A Evaluation reports I would not show to
17 another agency.

18 Q Even to the New York City Transit Police
19 Department?

20 A That's right. It would be very questionable;
21 I would get a clarification on the authority to give
22 this information.

23 Q This is startling to me. Are you trying to
24 tell me, and the Judge, that if the New York City Transit
25 Police Department, a man who has taken an application and

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O'Brien - cross

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1 has passed an examination in the New York City Transit
2 Police Department, is conducting an investigation of the
3 man, they are going to decide whether to appoint him from
4 the list, and they get in touch with the Police Department
5 of the City of New York, or they come down with their
6 lieutenant or whoever it is comes down, and you or your
7 predecessor or your successor will not exhibit to the
8 representative of the Transit Police --

9
10 A I would not do it without authorization from
11 someone of higher authority than myself.

12 Q So in other words you have to get authoriza-
13 tion and then you show it?

14 A What they would allow me to show.

15 Q All right. And the same procedure is true
16 with respect to private organizations.

17 You would want to get authorization?

18 A Private organizations I wouldn't even ask for
19 authorization. It would depend.

20 Q But you don't know what happened in '73, the
21 man who was there, what he did?

22 A No.

23 Q You don't know anything about that?

24 A Not in 1973.

25 MR. RESNICOFF: I have no further questions.

1 wce O'Brien - redirect 60

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2 REDIRECT EXAMINATION

3 BY MR. HERZOG:

4 Q When you were asked before about the Yonkers
5 Police Department, Mr. O'Brien, Mr. Resnicoff asked you
6 about the Post Office.

7 Would that be available to the Post Office?
8 I don't mean the Post Office Police Department; I mean the
9 Post Office.

10 A The Federal Government? No, sir.

11 Q But it would be open to the Post Office Police
12 Department?

13 A It would be open to the investigator,
14 whoever would do their investigating for them.

15 Q In other words the Post Office is not a
16 Governmental Police agency?

17 A No.

18 MR. HERZOG: That is all.

19 THE COURT: Are these rules and regulations
20 or is this procedure set forth anywhere in writing?

21 THE WITNESS: No, sir. Not that I have been
22 able to determine.

23 THE COURT: Gentlemen?

24 You are excused, Mr. O'Brien.

25 (Witness excused.)

1 wce

2 MR. HERZOG: Mr. Resnicoff, on this letter?

3 MR. RESNICOFF: I don't see the relevancy.

4 Let me see that letter again. You are making a mountain
5 out of a mole hill.

6 I don't want to put the trial over, I don't want
7 to tie the Judge up. No reason to tie myself up.

8 All right. Rather than, if your Honor please,
9 put the thing over --

10 MR. HERZOG: We will concede to the entry of
11 the letter from the City of Plainfield, dated September
12 27, 1974, which was objected to before, and we concede
13 to the entry of a letter sent by the plaintiff to Thomas
14 Trautwein, Patrolman at the Plainfield Police Division, in
15 regard to similar subject matter.

16 THE COURT: The one to Trautwein is Plaintiff's
17 1, and the other one is Defendants' 1.

18 (Plaintiff's Exhibit 1 received in evidence.)

19 (Defendant's Exhibit A received in evidence.)

20 MR. HERZOG: We have no further witnesses,
21 your Honor.

22 MR. RESNICOFF: Plaintiff rests, if your
23 Honor please.

24 THE COURT: With respect to the letter of
25 authorization --

1 wce

2 MR. HERZOG: Yes, your Honor.

3 THE COURT: --I want you both to stipulate on
4 the record that that will be --

5 MR. HERZOG: Part of the record.

6 THE COURT: --produced and be a part of the
7 record.

8 MR. RESNICOFF: I have no objection, if your
9 Honor please.

10 MR. HERZOG: And we will as soon as we can
11 locate it, your Honor, have it delivered to your chambers
12 personally.

13 THE COURT: All right.

14 MR. RESNICOFF: May I suggest that I get a
15 photostatic copy of it.

16 MR. HERZOG: Yes. As soon as I get it I will
17 Xerox it and send you a copy.

18 THE COURT: All right, gentlemen. I will
19 reserve and I will assume that both of you have made all
20 the motions and I will reserve.

21 MR. RESNICOFF: Thank you very much, Judge.

22 (Adjourned.)

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Plaintiff's Exhibit 1, Letter From City of
Plainfield dated September 27, 1974.

145a



PLAINTIFF
EXHIBIT
U.S. DIST. CT.
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CITY OF PLAINFIELD NEW JERSEY

CORPORATION COUNSEL
FRANK H. BLATZ, JR.

400 Park Avenue
Plainfield, N. J.
(201) 756-1000

September 27, 1974

Mr. Thomas C. Greble
The City of New York
Law Department
Municipal Building
New York, NY 10007

RE: Velger v. Cawley

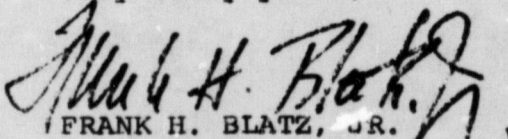
Dear Mr. Greble:

Please be advised that I have discussed the contents of your letter dated September 18 with the appropriate officer in our Police Division. In response thereto I emphatically state:

1. Mr. Velger's application for membership in the Plainfield Police Department has not been rejected, but rather is being held in abeyance because of our inability to get approval from him for a background check. It is our standard operating procedure to obtain background checks on all potential police department employees. His application will not be moved upon until such time as a thorough and complete background check is completed.
2. The status of Mr. Velger's application has in no way been influenced by the New York City Police Department.
3. The New York City Police Department has not supplied the City of Plainfield with any information concerning Mr. Velger himself, his background, or his prior employment by the City of New York.

I hope the foregoing clearly answers the question raised in your letter, and if you have any further questions, do not hesitate to contact me.

Very truly yours,


FRANK H. BLATZ, JR.
Corporation Counsel

FHB, JR.:jeh
cc: Lt. Henry Cunningham

Defendant's Exhibit A, Letter by Plaintiff
to Thomas Trautwein.DEFENDANT'S
EXHIBIT
A

Elliott H. Volgor

1855 Kennedy Blvd.

Jersey City, New Jersey 07305

February 15, 1974

Thomas Trautwein, PTL,
Plainfield Police Division
Personnel Section
200 E. 4th St.
Plainfield, New Jersey 07060

Dear Sir:

I am very sorry but I am not able to comply with your request for a release for my records from the New York City Police Department. My attorney has advised me not to sign any release due to the sensitive circumstances surrounding the case now in litigation. However, enclosed you will find a copy of the complaint now pending in court. Also, you will find verification of my employment with the New York City Police Department and a signed release for my records from the Penn-Central Railroad Police Department. My employer at the Del-Ray Engravers will cooperate with you to the fullest extent.

If you desire further information on my legal action, please contact my lawyer. His name is: Sam Resnicoff, Counselor at Law, 200 Broadway, New York, New York 10007, telephone - 212-DI9-3096 or DI9-3097.

Thank you for your consideration.

Sincerely,

Elliott H. Volgor

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ELLIOTT H. VELGER, :

Plaintiff, :

- against - :

OPINION

73 Civ. 2350 (HFW)

DONALD F. CAWLEY, Police Commis- :
sioner, City of New York, PATRICK :
V. MURPHY, former Police Commis- :
sioner, City of New York, THE :
CITY OF NEW YORK, HARRY I. :
BRONSTEIN, Personnel Director :
and Chairman, New York City :
Civil Service Commission, and :
ABRAHAM D. BEAME, as Comptroller, :
City of New York, :

Defendants. :

-----x

HENRY F. WERKER, D. J.

Plaintiff, Elliot H. Velger, has brought this action against the City of New York, the Police Commissioner of the City of New York, the Personnel Director and Chairman of the New York City Civil Service Commission, and Abraham D. Beame as Comptroller of the City of New York, for injunctive and declaratory relief as well as damages. Asserting jurisdiction under 28 U.S.C. §§ 1331 and 1334(3), (4), 42 U.S.C. §§ 1981 and 1983, and the Fourteenth Amendment, he alleges that after three years with the New York City Police Department as a "police trainee," and six months as a "probationary patrolman," he was discharged without a hearing or statement of charges against him. He asks this court to (a) declare such

termination violative of the due process and equal protection clauses of the Fourteenth Amendment, (b) issue a writ of mandamus directing defendants to reinstate him as a patrolman, (c) enjoin defendants from refusing to employ him in the future, and (d) grant him \$50,000 in damages.¹ After a trial on the merits, this court finds against plaintiff on all issues.

In an earlier decision on defendants' motion to dismiss for failure to state a claim, District (now Court of Appeals) Judge Murray Gurfein found that as probationary patrolman with no contractual tenure, Mr. Velger had no legitimate expectation of continued employment as a patrolman, and therefore was deprived of no property interest when discharged. Velger v. Cawley, 366 F. Supp. 874, 877-78 (S.D.N.Y. 1973). In Judge Gurfein's view, the only issue which saved Mr. Velger's case from dismissal was whether in discharging him defendants imposed a stigma on Mr. Velger that foreclosed his freedom to take advantage of other employment opportunities. Id. at 878. In Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court ruled that such stigmatization without prior notice and the opportunity for a hearing constitutes deprivation of liberty without due process of law.

In plaintiff's amended complaint the issue of stigma is raised by what he has chosen to call the first,

third and sixth "causes of action." As to that issue, the court finds the following facts:

- Plaintiff served in the New York City Police Department as a police trainee from January 31, 1970 to August 15, 1972, a few days after his 21st birthday, when he was appointed a probationary patrolman. Six months later, by letter dated February 8, 1973, the Police Department discharged him. The letter indicated that the Department "has decided not to retain you as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner."
- After termination plaintiff applied for security officer positions in the private sector, and took civil service examinations for both state and federal government service, passing 97% of them. He was subsequently interviewed for several of the civil service positions, but not recalled. On each application form, where asked to state whether he had ever been dismissed by an employer, plaintiff indicated his Police Department dismissal.
- One of the private sector jobs plaintiff sought was that of security officer with the Penn Central Railroad. After placing fourth in a field of 20 applicants tested, he was hired by the railroad for a probationary period on September 10, 1973. During the probationary period he was asked to sign, and did sign, a release form authorizing Captain Lonnie Hamilton of the Penn Central police to review his New York City Police Department records, and waiving any claims he might have against the Department for allowing Captain Hamilton to see them.
- The Police Department refused to release any information about Mr. Velger to Captain Hamilton by letter. When he phoned, he was informed that only if he were to present the waiver letter in person, in New York, would he be allowed to examine Mr. Velger's file. On doing so Captain Hamilton was given the personnel file, from which he gleaned that plaintiff had been dismissed because while still a trainee he had put a revolver to

his head in an apparent suicide attempt.

- Captain Hamilton tried to verify this story, but the Police Department refused to cooperate with him, advising him to proceed by letter. In light of his previous failure to obtain information by letter, Captain Hamilton declined to pursue the matter further; he returned to the Penn Central and recommended that Mr. Velger be terminated. This was done on November 11, 1973.
- The unwritten policy of the present administrative manager of Police Department personnel files is that no information whatsoever is released about former employees to any one in the private sector. (No evidence was introduced as to the policy of his predecessor during the time period in issue.) Unwritten policy with respect to government police agencies is that background information on former employees is available to those agencies as a matter of course. Although information as to why an employee was discharged is not formally available to such agencies, it appears to be possible for them to obtain it informally.

It is clear from the foregoing facts that plaintiff has not proved that he has been stigmatized by defendants. He has not established that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers; in the one instance in which such information did reach an employer, it did so through plaintiff's own authorization. Plaintiff has not established that unfavorable information on his police record was released to any of the governmental agencies to which he has applied for employment. Lastly, plaintiff has not established or even attempted to show that those agencies have relegated his applications, for any reason whatsoever, to ineligible status. Plaintiff, in short, has not sustained

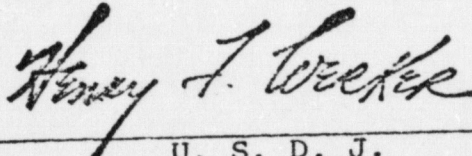
his burden of proof.

As to the other five so called "causes of action" in plaintiff's amended complaint, none merit lengthy discussion. The eighth must be dismissed for lack of standing. See n. 1, supra. The seventh and fifth fail to state a claim on which relief can be granted. The fourth was previously decided against plaintiff by Judge Gurfein. 366 F. Supp. at 877-78. Lastly, the second does not state a cause of action. See Koscherak v. Schmeller, 363 F. Supp. 932 (S.D.N.Y. 1973) at 935-36.

Judgment is hereby granted for defendants without costs.

SO ORDERED

Dated: New York, New York
December 10, 1974



U. S. D. J.

ELLIOTT H. VELGER v. DONALD F. CAWLEY, et al.

73 Civ. 2350 (HFW)

NOTES

1. He also asks that section 3 of the New York Public Officers Law and section 58 of the New York State Civil Service Law, establishing minimum age limits for certain public officer positions, be declared unconstitutional. For this purpose he requests the convening of a three-judge court. Plaintiff fails to include in his prayer for relief, however, a request that the enforcement of those statutes be enjoined. Under 28 U.S.C. § 2281 a three-judge court is required only when such an injunction is sought. Astro Cinema Corp., Inc. v. Mackell, 422 F.2d 293, 298 (2d Cir. 1970). See also Wright, Federal Courts at 190 (2d ed. 1970).

This court fails to see in any case how plaintiff has standing to challenge those statutes. Section 58, by its own terms, does not apply to the New York City Police Department. Furthermore, plaintiff has made no showing as to either section that he is, or has been, in any way harmed by them. (He likewise has made no offer of proof as to how or why they are unconstitutional.) Plaintiff's eighth cause of action, seeking a declaration of unconstitutionality, must therefore be dismissed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLIOTT H. VELGER,

Plaintiff,

- against -

DONALD F. CAWLEY, Police Commissioner,
City of New York, PATRICK V. MURPHY,
former Police Commissioner, City of
New York, THE CITY OF NEW YORK, HARRY
I. BRONSTEIN, Personnel Director and
Chairman, New York City Civil Service
Commission, and ABRAHAM D. BEAME, as
Comptroller, City of New York,

CIVIL ACTION
No. 73-2350

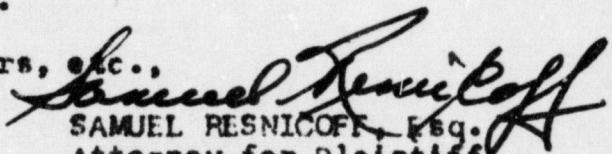
Defendants.

S I R :

PLEASE TAKE NOTICE that the plaintiff hereby appeals to the United States Court of Appeals for the Second Circuit, from the Order and Judgment entered herein on the 10th day of December, 1974, in the Office of the Clerk of the United States District Court for the Southern District of New York, which dismissed the complaint and granted judgment to defendants, and plaintiff appeals from each and every part of said Order and Judgment, as well as from the whole thereof.

DATED: New York, January 7, 1975.

Yours, etc.,


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TO:-

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